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A TREATISE

ON THE LAW OF

JUDICIAL AND EXECUTION
SALES.

By DAVID RORER,
OF THE IOWA BAR.

SECOND EDITION.

CHICAGO:
CALLAGHAN AND COMPANY.
1878.

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Dedication.

TO THE
HON. SAMUEL F. MILLER, LL.D.,
ASSOCIATE JUSTICE
OF THE
SUPREME COURT OF THE UNITED STATES,
AS AN EXPRESSION
OF THAT RESPECT AND REGARD WHICH ARE SO EMINENTLY DUE TO HIS
GREAT PERSONAL WORTH AND LEGAL LEARNING,
THIS VOLUME IS DEDICATED,
BY
THE AUTHOR.

PREFACE.

The favorable reception by the courts and the legal profession of the original edition of this work, encourages the author to lay before them a second edition, greatly enlarged, and so re-arranged as to afford a more ready reference to the contents. All the cases cited, both old and new, have been carefully verified. This has been done by L. Mayer, Esq., of the Chicago Bar, to whom also its editing has been confided. His faithful and able discharge of those duties is hereby acknowledged.

DAVID RORER.

BURLINGTON, Iowa, April, 1878.

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JUDICIAL AND EXECUTION SALES.

PART I.

CHAPTER I.

THE NATURE OF JUDICIAL SALES.

- I. IN GENERAL.
- II. IN PROCEEDINGS PURELY *in rem*.
- III. IN PROCEEDINGS PARTLY *in rem*, AND PARTLY *in personam*.

I. IN GENERAL.

§ 1. As a judicial act is one “supposed to be done *pendente lite* (of some sort or other,)”¹ so a judicial sale is, in contemplation of law, a sale made *pendente lite*; a sale in court, and the court is the vendor. The authorities all concur that judicial sales are sales by the court. It matters not to the contrary, that it is made through the instrumentality of a master, commissioner, or other functionary, appointed thereto by the court; it is not valid or binding, and confers no right to the property sought to be sold until confirmed by the court. By such confirmation it is judicially made the act of the court, and is, therefore, a judicial sale. The master or commissioner, in conducting it, acts by authority of and as the instrument or agent of the court. In the language of the court, in *Bozza v. Rowe*,² “the master is the mere instrument of the court, acts under its directions, and is subject to its control, * * * * and his acts, under the decree, when regular, are considered those of the chancellor, and that the biddings are not binding and can not be enforced until approved by the court.”

¹ *Medhurst v. Wait*, 3 Burr. 1259.

² 30 Ill. 198; *Andrews v. Scotton*, 2 Bland, 629; *Williamson v. Berry*, 8 How. 547; *Southern Bank of St. Louis v. Humphreys*, 47 Ill. 227; *Harrison v. Har-*

§ 2. In *Griffith v. Fowler*,¹ the learned Judge (REDFIELD), speaking of sales in Admiralty, says, "But these cases bear but a slight analogy to sheriff's sales in this country or in England. Those sales are strictly judicial, and are merely carrying into specific execution a decree of the court *in rem*, which, by universal consent, binds the whole world." And again, in the same case, it is said: "It is plain, then, that a sheriff's sale is not a judicial sale."

§ 3. If the sheriff be appointed by the court, instead of a master or commissioner, to conduct the sale, as in the *Minnesota R. R. Co. v. St. Paul*,² yet he sells by virtue of the decree, and not by virtue of his office of sheriff, and the sale is the sale of the court when confirmed.

§ 4. In *Williamson v. Berry*,³ the United States Supreme Court characterize a judicial sale as one "made under the process of a court having competent authority to order it, by an officer legally appointed and commissioned to sell."

rison, 1 Md. Ch. Dees. 331; *Mason v. Osgood*, 64 N. C. 467; *Hurt v. Stull*, 4 Md. Ch. Dees. 391; *Sewall v. Costigan*, 1 Md. Ch. Dees. 208; *Moore v. Shultz*, 18 Penn. St. 102; *Vandever v. Baker*, Ib. 121, 126; *Wagner v. Cohen*, 6 Gill, 97; *Iglehart v. Armiger*, 1 Bland, 527; *Mullikin v. Mullikin*, 1 Bland, 538; *Thorn v. Ingram*, 25 Ark. 52; *Forman v. Hunt*, 3 Dana, 621; *Young v. Keogh*, 11 Ill. 642; *Ayers v. Baumgarten*, 15 Ill. 444; *Penn v. Heisey*, 19 Ill. 297; *Rawlings v. Bailey*, 15 Ill. 178; *Blossom v. R. R. Co.* 3 Wall. 207; *Minnesota R. R. Co. v. St. Paul Co.*, 2 Wall. 609, 640; *Griffith v. Fowler*, 18 Vt. 394. In *Yerby v. Hill*, 16 Texas, 377, 381, the court, by WHEELER, Justice, say: "His pur-chase is not complete, and no title vests until the action of the court confirming the sale." *Halleck v. Guy*, 9 Cal. 181, 195; *Wooley v. Russ*, 24 La. Ann. 483; Succession of Hawkins, 2 La. Ann. 923; Succession of Day, 2 La. Ann. 895; *Wright v. Cummings*, 19 La. Ann. 353; Succession of Wadsworth, 2 La. Ann. 966; *Gibson v. Foster*, 2 La. Ann. 503; *Bolgiano v. Cooke*, 19 Md. 375, 391; *Lynch v. Baxter*, 4 Tex. 431; *Poor v. Boyce*, 12 Tex. 440; *Barker v. Coe*, 20 Tex. 429; *Brown v. Christie*, 27 Tex. 73; *Edmondson v. Hart*, 9 Tex. 554; *Williams v. McDonald*, 18 Tex. 322; *McKee v. Lineberger*, 69 N. C. 240; *Smith v. Brittain*, 3 Ired. Eq. 351; *Williams v. Council*, 8 Jones L. (N.C.) 229; *Ashbee v. Cowell*, Busbee Eq. R. 158; *Thompson v. Cox*, 8 Jones L. (N. C.); *State Bank Ex parte Dev. & Batt.* 75; *Myers v. Nourse*, 5 Fla. 516, 526; *Watson's Adm'r v. Violett*, 2 Duvall, 332; *Cazet v. Hubbell*, 36 N.Y. 677; *Requa v. Rea*, 2 Paige, 339; *Deaderick v. Watkins*, 8 Hump. 520; *Wood v. Mann*, 2 Sumn. 318, 326; *Gross v. Pearcy*, 3 Pat.&H. (Va.) 483; *Planters' Bank v. Fowlkes*, 4 Sneed, 461; *Stimson v. Mead*, 2 R. I. 541; *Brasher v. Cortlandt*, 2 John Ch. 505; *Atty. Gen. v. Day*, 1 Ves. Sr. 218.

¹ 18 Vt. 394.

² 2 Wall. 609, 640; *Baily v. Baily*, 9 Rich. Eq. (S. C.) 392, 395, 396.

³ 8 How. 547.

But the court obviously refer here to the sale in a popular sense, or to that part of the transaction which consists of the doings of the master or person conducting the sale, and not to that final action of the court which alone confers validity, and which terminates the sale by the judicial act of confirmation. For, in the same connection, the court say "that such sales, until approved by the master and confirmed by the court, give no title to a purchaser of an estate which he may have bargained to buy."¹

§ 5. In *Williamson v. Berry*,² the court hold that the approbation of the master or person conducting the sale does not complete a title in a purchaser; but that this is only "one step toward a purchaser's getting a title."

This language of the court fully bears us out in the assumption that in describing a judicial sale as one made under "the process of a court having competent authority to order it, by an officer *legally* appointed and commissioned to sell," they mean only that the proceedings up to the final confirmation are conducted by such officer until the bargain is agreed to, when the purchaser, "before he can get a title," (in the language of the court,) "must get a report from the master (or person selling) that he approves the sale," and "that report then becomes the basis of a motion to the court, by the purchaser, that his purchase may be confirmed."³

It is equally clear that by the term "by an officer legally appointed and commissioned to sell," is meant an appointment and commission from the court, and not the ordinary ministerial officers of law courts, as sheriffs, or marshals, in mere virtue of their commission.

¹ 8 How. 546.

² Ibid.

³ Ibid. For the necessity of such confirmation, see also *McVey v. McVey*, 51 Mo. 406; *Castleman v. Reife*, 50 Mo. 583; *Wilson v. Wilson*, 36 Ala. 655; *Heydenfelt v. Towns*, 27 Ala. 423, 429; *Satcher v. Satcher's Admr.*, 41 Ala. 35; *Peters v. Caton*, 6 Tex. 554; *Graham v. Hawkins*, 38 Tex. 632; *Brown v. Christie*, 27 Tex. 77; *Hirshfield v. Davis*, 43 Tex. 155; *Berry v. Young*, 15 Tex. 369; *Burdett v. Silsbee's Admr.*, 15 Tex. 604; *Yerby v. Hill*, 16 Tex. 377; *Dowling v. Duke*, 20 Tex. 181; *Wells v. Mills*, 22 Tex. 302; *Vandyke v. Johns*, 1 Del. Ch. 93; *Redus v. Hayden*, 43 Miss. 614; *Mitchell v. Harris*, 43 Miss. 314; *Learned v. Matthews*, 40 Miss. 210; *Smith v. Denson*, 2 S. & M. 326; *Hoel v. Coursery*, 26 Miss. 511; *Bland v. Muncaster*, 24 Miss. 62; *Monk v. Horne*, 38 Miss. 100; *Tooley v. Gridley*, 3 S. & M. 493; *Sanders v. Dowell*, 7 S. & M.

§ 6. True it is, that the power of the chancellor is such that he may dispense with many of the formulas attendant usually on judicial sales in his court, but this power of dispensation is not an attribute of inferior courts, acting under a limited chancery power conferred by statute. As, for instance, courts of probate, or others exercising probate jurisdiction in proceedings for the sale of a decedent's lands, or the lands of a ward. Such tribunals may not dispense with, but must carry out all such requirements as the statute demands as indispensable to validity, whatever they may be. But omission as to such as are directory only is merely error.¹

§ 7. In *Mason v. Osgood, Adm'r*,² the Supreme Court of North Carolina hold the following to be the law in relation to a sale of lands by an administrator: "He is a mere agent of the court to execute a naked power, and a purchaser acquires no right to the land until the sale is confirmed and title made, under an order of the court granting the power of sale," and

206; *Osman v. Traphagen*, 23 Mich. 80, 85; *The People v. Judge of Third Circuit*, 19 Mich. 296; *Williams v. Woodruff*, 1 Duvall, 257; *Matthews v. Eddy*, 4 Oregon, 225; *Evans v. Spurgin*, 6 Gratt. 107; *Hudgins v. Hudgins' Exr.*, 6 Gratt. 320; *Phillips v. Dawley*, 1 Neb. 320; *Eakin v. Herbert*, 4 Cold. 116, 119; *Walker v. Walker*, 4 Cold. 300; *Lasell v. Powell*, 7 Cold. 278; *Sturdy v. Jacoway*, 19 Ark. 499, 512.

¹ *Williamson v. Berry*, 8 How. 546.

² 64 N. C. 467, 468. And so again in *McKee, Sheriff, v. Lineberger*, 69 N. C. 240, above cited, the distinction betwixt judicial and execution sales is clearly taken. The court (PEARSON, J.) in that case say: "It will be seen that a bidder at a sheriff's sale occupies a relation altogether different from a bidder at a sale made by order of a court of equity either by its clerk or master, or by a commissioner, for then the court takes the matter into its own hands and *makes the sale for the parties*, holding the cause for further directions, taking the bidder under its protection and control, so as to relieve him from his bid, if there be ground for it, or to compel him to perform his contract specifically, and managing the whole proceeding until the sale is in all things carried into effect; whereas the sheriff makes the sale by himself, without any confirmation or other act of the court, and acts by force of a statutory power to sell, receive the price and make the title; so the court has no priority or control over the bidder, and the sheriff is left to his own action." In the case of sheriff's sales the sheriff may recover the purchase money, if not paid, in his own name, and though he goes out of office, may yet execute the deed (save where there is statutory provision to the contrary), and it will relate back to date of sale or of the lien, if any; and this doctrine the Supreme Court of North Carolina, in the case above cited, very justly characterizes as "*familiar learning.*" See also *Smith v. Brittain*, 3 Ired. Eq. 351; *Williams v. Council*, 8 Jones L. 229.

that, "if the administrator fails to report the sale, the purchaser may apply to the court by a motion in the cause for a rule to compel such return, so that the court may confirm the sale if it sees proper. * * * In our case the sale was not confirmed, the plaintiff has no right to the land and no claim to equitable relief."

The case cited from 64 N. C. was of a bill filed in chancery to coerce a deed from an administrator by one who had bid off the land at the sale, and who was refused a conveyance by the administrator. The chancellor held that the remedy was by motion in the same court that ordered the sale.¹

§ 8. In the case of *Halleck v. Guy*,² the Supreme Court of California use the following language in reference to the nature of administrator's sales of lands in probate: "The mode of sale is pointed out by express statute. When sold, the report of the sale is made by the administrator to the court, and unless confirmed by order of the court there is no binding sale, and no title can pass to the purchaser. To be valid, the sale must first be ordered by the court, and afterwards confirmed by it. The order of sale and the order of confirmation are both judicial acts; and these two concurring make the sale a judicial sale, and, therefore, not within the statute of frauds." And again the court say: "It is true that there is a difference in the mode of enforcing a sale ordered by a court of chancery and that of a sale by order of the probate court. But this difference in the mere mode does not affect the character of the sale itself. When a sale is made under a decree in chancery the bidder may be committed for contempt if he refuses to comply with his bid." * * * * "If we concede that the probate court can not commit the bidder for contempt when he fails to comply with his bid, this does not change the character of the sale."³

§ 9. In *Hurt v. Stull*,⁴ the court say of a decree of sale for purchase money: "It was a proceeding *in rem*, and by the decree the land was condemned to pay the claim of the party who sold it, and in whom the legal title still remains. Although the court, in the execution of this decree and others of a like nature,

¹ *Ibid.*

² 9 Cal. 181, 195.

³ *Ibid.*

⁴ *Hurt v. Stull*, 4 Md. Ch. Decs. 391, 393; *Iglehart v. Armiger*, 1 Bland, 527; *Forman v. Hunt*, 3 Dana, 622; *Campbell v. Johnson*, 4 Dana, 186.

employs a trustee, that officer is its agent, the court itself being the vendor, acting through the instrumentality of its agent.” And in *Glenn v. Clapp*,¹ the same court characterize such sales as “transactions between the court and the purchaser.”

In *Vandever v. Baker*,² the Supreme Court of Pennsylvania say of an administrator’s sale of lands that it is a “judicial sale,” and has been so ruled more than once.

In a legal sense, the sale is made by the court itself in enforcement of its own orders and decrees, wherein is described the property to be sold. The person who conducts the same is merely the instrument or means used by the court to bring about such executory agreement as the court closes, if satisfied therewith, by final act of confirmation, which makes the court the vendor.³ Such sale is unlike a sheriff’s sale on ordinary common law, or statutory execution, which is a *ministerial* and not a *judicial* act; and in making which the law regards the officer, and not the court, as the vendor.⁴

¹ 1 Gill. & J. 1, 8.

² 13 Penn. St. 126.

³ *Ib. and Forman v. Hunt*, 3 Dana, 622; *Campbell v. Johnson*, 4 Dana, 186; *Armor v. Cochrane*, 66 Penn. St. 308, 311. In the latter case the court characterize the person conducting the sale as “the mere *organ* of the court in making the sale.” *Bozza v. Rowe*, 30 Ill. 198; *Armstrong’s Appeal*, 68 Penn. St. 409 411.

⁴ *Gowan v. Jones*, 10 S. & M. 164; *Griffith v. Fowler*, 18 Vt. 394. “On considering the nature of sales under authority of the Court of Chancery the first inquiry which suggests itself is, who are the real parties to the contract? This very idea of a contract implies that there is one party able and willing to contract and another to contract with. It implies a perfect capacity and free will in each of the parties to the agreement. To a contract of sale, made under a decree of this court, neither of the litigating parties can be considered as the vendor, although they, with others, such as creditors, who may be allowed to come in afterwards, may be very materially interested in the sale. The plaintiff can not be considered as the vendor, because, oftener than otherwise, he has no title, always states his inability to sell, and prays the court to decree that a sale be made.

“The defendant can not be the vendor, because he always positively refuses to part with his property, unless forced or sanctioned in doing so by the power of the court. If, then, neither of the litigating parties can be separately deemed to be the vendor, it is clear that they can not both together be so considered.

“But such sales are always made by an agent. In England, by a master; in this State, by a trustee. Private contracts may be made and executed in person or by attorney; but the attorney is never considered as one of the contracting parties — he exercises no will or power of his own — he is merely the medium, or conduit, through which the will of the contracting party is

§ 10. The decree for a sale, though so far final that an appeal will lie, is not final but interlocutory, in such other respects as it does not reach the ends contemplated by the proceeding, which are only attained by confirmation, thereby giving finality to the proceedings. The sale is not made by authority of the person in charge of it, but by authority and under control of the court,

expressed. The master or trustee is the mere attorney of the court, acting under a specially delegated authority. And in no case is a master or trustee authorized to do more than to accept an offer or proposal to contract, which is of no sort of validity unless it be accepted, ratified and confirmed by the court. *It is the court itself, for the benefit of all interested, therefore, who is the vendor in such cases?*

"But it may be said, if the court be the vendor in sales made by its trustee, would it not follow, for the same reasons, that a court of common law must be considered as the vendor in sales made under its writ of *fieri facias* by the sheriff? The cases are essentially different. The writ of *fieri facias* is a general authority or command to the sheriff to make so much money by sale from the personal estate of the defendant. By this writ the executive officer of the court is commissioned to seize the whole, any part, or so much of the defendant's personal estate as may be necessary to raise the specified sum of money. No particular articles of property are ever designated. By statute, this power, given by the common law writ over personal estate, has been extended over real estate. And the same writ, and nearly the same principles of law, now apply to both species of property.

"The real or personal estate with which the Court of Chancery deals is, however, always in one form or other distinctly specified in the proceedings, and the sale is made only because the court is asked to have it made to accomplish the objects of the suit. In the proceedings at common law, from the commencement to the *fieri facias*, no property is designated. At common law, the terms and manner of sale are regulated by law; in chancery, they are regulated by the court. At common law, if the sheriff, in seizing the property and making the sale, conforms to the established regulations applicable to all cases, (and he can sell in no other manner,) the sale is final and valid as soon as it is made. But in chancery the sale is, in no case, binding and conclusive until it has been expressly approved and ratified by the court. If it be made in a manner wholly different from that prescribed by the court, it may yet be sanctioned; or, if it be made in all respects conformable to directions, it may still be rejected. And hence, it is obvious that in one case it is the Court of Chancery who is the real vendor, and in the other the sheriff, or executive officer of the court.

"In an English case, which arose on a sale under the authority of the Court of Chancery, decided in the year 1721, in which the question was, whether the purchaser should be compelled to complete his purchase or not, the matter is spoken of as one perfectly settled. 'Upon a contract betwixt party and party,' says the chancellor, 'the contractor would not be decreed to pay an unreasonable price for an estate; so neither ought the court to be partial to itself, and to do more upon a contract *made with itself*, or carry that further, than it would a contract betwixt party and party.' On the other hand

"which prescribes or ought to prescribe the time, manner and conditions of the sale."¹

When an acceptable bidder is found, and an agreement as to terms is attained, then report thereof is made to the court, and the court confirms it or not, at discretion.²

Before such confirmation the purchase is so incomplete that a loss by fire falls on the vendor or owner, though it occur after acceptance of the bidding and after report of the sale.³

§ 11. And in South Carolina, whether the ordinary officer of the court, or some other person be appointed commissioner or master to sell, or the sheriff as sheriff, in making judicial sales, in either case, the sale is made under the direction of the court expressed in the decree, as to the terms, the notice to be given and place of sale, all which should be prescribed in the decree or order of sale, and are the guide of the person selling. They become a part of the law of the case, and are necessary to be complied with, as conditions on which alone the authority can be legally exercised, and their omission destroys the validity of the sale, and it will be set aside and a resale ordered.⁴ Thus it is held in like manner in Tennessee, that as sales of real estate under a decree, they are not complete until confirmed by the court.⁵ So, if in the intervening time between sale and confirmation, the property is lost by fire, or diminished in value, the purchaser is not liable to incur the loss; as where mills situate on the lands sold, were burned before confirmation. It was held that the purchaser was not bound to complete the purchase.⁶ In Tennessee the doctrine as to confirmation is "conformed rather

the court might be said to have rather a greater power over a contract made with *itself* than with any other." And in other cases of recent date, when the subject has been brought into view, the court has, in like manner, been spoken of and considered as the vendor." Andrews *v.* Scotton, 2 Bland, 629.

¹ Moore *v.* Shultz, 13 Penn. St. 102; Coffey *v.* Coffey, 16 Ill. 141; Harlan *v.* Murrell, 3 Dana, 181; Sowards *v.* Pritchett, 37 Ill. 517; Knarr *v.* Conaway, 42 Ind. 260. To leave such direction to plaintiff, or a party, is error.—*Ibid.* Perry *v.* Seitz, 2 Duvall, 122.

² Williamson *v.* Berry, 8 How. 547; Harrison *v.* Harrison, 1 Md. Ch. Decs. 331; Moore *v.* Shultz, 13 Penn. St. 102; Taylor *v.* Gilpin, 3 Met. (Ky.) 544; Sowards *v.* Pritchett, 37 Ill. 517.

³ Wagner *v.* Cohen, 6 Gill, 97, 102; *Ex parte Minor*, 11 Ves. 559.

⁴ Baily *v.* Baily, 9 Rich. Eq. 392, 395, 396.

⁵ Eakin *v.* Herbert, 4 Coldwell, 116; Walker *v.* Walker, 4 Coldwell, 300; Lassell *v.* Powell, 7 Cold. 277.

⁶ Eakin *v.* Herbert, 4 Coldwell, 116.

to the English practice than to that of some of the American courts."¹

§ 12. After confirmation, however, the loss is on the purchaser and he is bound to complete and execute the terms of purchase.²

§ 13. Sales under decrees and on executions are not upon the same footing.³ In selling under execution the officer sells by the naked authority of the writ and requirement of the law. No report to the court, or confirmation, is necessary, (except in some States where it is required by statute.) Nor are they subject to be set aside except by direct proceedings. But they must conform to the law, else they will be irregular, or void, according to the degree of departure therefrom.⁴

But sales on the decrees are made under the control of the court and will be opened merely for an advance of price, if large enough, although there be no error, or fault; and irregularities or omissions may be disregarded and the sale confirmed; after confirmation, they do not affect the sale in collateral proceedings if there was jurisdiction.⁵ And although if there be no record of confirmation, yet from great lapse of time, accompanied by possession in the purchaser, confirmation will be presumed; as

¹ Per HAWKINS, J., *Eakin v. Herbert*, 4 Coldwell, 119. (And this rule applies equally to cases in which it is sought to compel a purchaser to complete his purchase, as to those in which the latter seeks to enforce the contract.—*Ibid.*)

² 2 Daniel's Ch. Prac. 1452, 1454, 1455, 1463; *Childress v. Hurt*, 2 Swan 487; *Houston v. Aycock*, 5 Sneed. 406, cited by the Court in *Eakin v. Herbert*, *supra*.

³ *Lasell v. Powell*, 7 Cold. 278.

⁴ *Ibid.*

⁵ *Ibid.* As to difference in character between sales made under decrees and sales made on ordinary writs of execution at law, the Supreme Court of Tennessee, following the general ruling, say, as recently as December term, 1869, ANDREWS, J.: "Sales made by a clerk and master, under the direction of a court of chancery, do not stand, in all respects, upon the footing of sales made by a sheriff, under executions. The latter are made under the naked authority of the writ—not under direct supervision of the court. They are not reported to the court, except by the return upon the writ, nor subject to be set aside, and require no confirmation by it." Hence they must

* The suggestion of the court in this case that execution sales *require no confirmation*, is made in reference to the common law practice, but in some of the States, as we have seen elsewhere, such sales are by statute required to be referred to the court for approval or disapproval, and unless in such cases *confirmed*, they are incomplete and invalid, (except, perhaps, where a great lapse of time, accompanied by possession of the purchaser, shall serve to validate the same.)

also by acquiescence of the parties amounting to a recognition of the sales as valid.¹

§ 14. And though the order of sale laid down in the decree be departed from in the conduct of the sale, yet when the master or commissioner selling, reports his proceedings and sale fully to the court, and the same is by the court *confirmed*, such non-conformity is not a matter of objection thereafter, if there be no fraud.² For the sale being under decree of court, the purchaser has a right to presume every thing to have been properly done. In the case here cited, the commissioner sold other land than that ordered in the decree, and the court affirmed the sale, a plat of the lands really sold having been placed before the court, with the commissioner's report. The sale was held valid on bill filed to set the same aside.

§ 15. In *Harrison v. Harrison*,³ the court affirms the doctrine of *Andrews v. Scotton*, and say it is the well understood law, "that in sales made under authority of decrees in chancery, the court is the vendor, the trustee being the mere agent or attorney of the court under a special delegated authority, and the true character of such a sale is that it is a transaction between the court and the purchaser; and a private sale; as well as a public sale, may be made if the court deems it advantageous.

§ 16. In the case of *Harrison v. Harrison*,⁴ the court further be made, in all respects, in accordance with the rules which the law lays down, for the protection of the owner of the property; and if not so made, may be held irregular, or void.

"But sales made under the decree of a court of chancery are, to a considerable extent, under the discretionary control of the court. It will often set them aside where no error or irregularity has been committed, merely for the sake of an advance in the price; and it may, if satisfied that no injustice has been done, disregard irregularities, in the conduct of the sale, and *confirm* the action of the master." *Lasell v. Powell*, 7 Cold. 282.

¹ *Tipton v. Powell*, 2 Cold. 19, (1869.)

² *McGavock v. Bell*, 3 Coldwell, 512.

³ 1 Md. Ch. Decs. 332, 333. "These sales are less expensive than when made on executions; more time is allowed to make them; the discretion of the court is exercised as to time, manner and terms of sale; whereas, on sales by a sheriff, all is by compulsion, and no credit is allowed; he can not offer one entire piece of property for sale in parcels; the administrator can divide and sell as best subserves the interest of the heirs, and sell only so much as the emergency of the case requires." *Grignon's Lessee v. Astor*, 2 How. 343, 344.

⁴ 1 Md. Ch. Decs. 335.

say: "The differences are so many and material," between sales by a trustee in chancery and sales on execution by a sheriff, "that it is impossible, with safety, to apply any one principle to them both. But the vital difference perhaps with reference to the question now under consideration is, that the sheriff's sale, if made conformably to law, is final and valid, and passes the title; whereas, chancery sales, the court being the vendor, are not binding and conclusive until approved and ratified by the court."

And such, too, is the current of authorities. The court affirms the sale or not, at its discretion, and until affirmed, the supposed sale is no sale, and confers no rights.¹

¹ But if the purchaser take and keep possession, it may become ratified and valid by lapse of time.²

It is not the sale of the officer or person charged with it, for apart from the court he has no power to sell. But when confirmed, it is the sale of the court.³

In *Sewall v. Costigan*,⁴ the same doctrine is held. The court say: "In fact, the sale made by him (the trustee) is the sale of the court, he being the mere instrument or agent, by whose hands the court acts."—"It is the sale of the court and not his sale."

§ 17. In *Forman v. Hunt*,⁵ the Supreme Court of Kentucky draw the distinction between sheriff's sales at law and judicial sales as follows: "Sales under execution are made by an officer of the law, who is required by law, as well for the benefit of plaintiffs and defendants as others who may be injured by his official defalcations, to give bond and good security for the faithful discharge of his duties," and remark that "the law is the only guide of the sheriff," that his sales are perfect and complete, and that the title passes to the purchasers without confirmation (ordinarily) of the court; but that "a commissioner appointed by the chancellor to sell is the mere ministerial servant and agent of the chancellor." That he has no guide but his instructions in the decree; gives no bond; must report to the court;

¹ *Taylor v. Gilpin*, 3 Met. (Ky.) 544; *Williamson v. Berry*, 8 How. 547; *Mason v. Osgood*, 64 N. C. 467; *Thorn v. Ingram*, 25 Ark. 52.

² *Gowan v. Jones*, 10 S. & M. 164.

³ *Ibid.* and preceding cases cited.

⁴ 1 Md. Ch. Decs. 208, 209.

⁵ 3 Dana, 621.

and that a sale, that is an agreement to sell, made by him, is not valid "until it is sanctioned by the chancellor." It is inoperative until confirmed by the court. In *Busey v. Hardin*,¹ it is held that "the highest bidder at sales under decrees does not, like a bidder at sheriff's sales under execution, acquire any independent right to have the purchase completed; but he is nothing more than a preferred bidder, or proposer for the purchase, *subject to confirmation by the chancellor.*"

§ 18. We may add that a judicial sale is made *pendente lite*; whereas, an execution sale is made after litigation in the case is ended; for, as we have before seen, a judicial act is something done during the pendency of a suit.² The suit does not end with the decree of sale; the proceeding still continues until final confirmation. So, the converse of the principle follows, that what is done *in pais* after litigation is ended, or after the cause is finally disposed of, if there were no adverse litigation, is not done judicially, and is not a judicial act, but is executive or else is ministerial.

§ 19. Another remarkable distinction may here be noticed between judicial and execution sales. In some decrees for judicial sales the primary object of the order or decree is to sell the property, and in such cases the sale can not be prevented, except by judicial interference. But the writ of execution, on judgments at law, or when issued on money decrees or orders to pay money, commands the officer to levy the money of the property of the debtor, and though a sale is the consequence of such levy if the money be not paid, yet the primary object of the writ is to get the money, and, therefore, its payment to the officer holding the writ by the debtor prevents a sale.

§ 20. So likewise in some proceedings and decrees for judicial sales, as in mortgage foreclosures, decrees to enforce statutory liens, vendor's liens, and such other orders of sale as are merely designed to enforce payment of a sum of money; as the primary object of the proceedings is to make the money, the debtor may

¹ 2 B. Mon. 407.

² *Medhurst v. Wait*, 3 Burr. 1262. In *Girard Life Ins. Co. v. Farmers' and Mechanics' Bank*, 57 Penn. St. 397, the court, in discriminating between an order of sale and a writ of execution, uses the following language: "The word execution has always been understood as meaning a *writ*, to give possession of a thing recovered by judgment or decree. It is clearly distinguishable from a mere order of sale."

put an end to the proceedings and prevent the sale by paying the amount.

§ 21. In *Griffith v. Bogert*,¹ Justice GRIER speaks of an execution sale as a *judicial* sale. But by reference to that case it will be seen that it emanated from Missouri, where by the statute law execution sales at law are reportable to the court for confirmation. That the sale in question had been so reported and confirmed, as is shown by the learned justice; wherefore he says, "the deed was acknowledged in open court according to law. At this time, all parties interested could and would have been heard, to allege any irregularities in the proceedings that would justify the court in setting it aside. * * * * But when objections are waived by them, and the judicial sale founded on these proceedings is *confirmed* by the court, it would be injurious to the peace of the community and the security of titles to permit such objections to the title to be heard in a collateral action." Here it is the judicial act of confirmation that gives judicial character to the sale. Such, too, is the case in Pennsylvania and some other States.

§ 22. Justice STORY puts the distinction between judicial and ministerial or execution sales, seemingly, upon the same ground. In *Smith v. Arnold*,² which arose in reference to an administrator's sale of lands in probate in Rhode Island, the learned justice considers the sale within the statute of frauds, for that it is not a judicial sale, inasmuch as such sales in Rhode Island are not required by law to be confirmed by the court.

And we think we will be generally borne out in the suggestion that whenever execution sales are characterized as judicial, they either have to be confirmed by law, or else the expression has been casually made. The characterizing of execution sales generally as such very recently in head notes and indexes of books of reports, is a mere matter of taste of the reporter, and of no authority.

§ 23. Judicial sales are not *within the statute of frauds*. No writing signed by the bidder or his agent is necessary to

¹ 18 How. 158, 164.

² 5 Mason, 414, 420. (And here there was an entry of the clerk of the sale which would take it out of the statute of frauds. *Wolfe v. Sharp*, 10 Rich. L. (S. C.) 63.)

bind him to his bid.¹ The reason is, that the dealing is with the court, and the court will not allow itself to be trifled with in that respect. A bid offered to the person conducting the sale, is a *bid offered to the court*; and a bid accepted by such person is a *bid accepted by the court*, for its future consideration and judicial determination in confirming or refusing confirmation of the sale, and from which the bidder may not recede, (except for reasons acceptable to the court. See Sec. 589.) On the contrary, the carrying out of the purchase will be enforced against him as a party in court to the proceedings, which he becomes by the acceptance and report of his bid.² But execution sales are within the statute.

§ 24. Though there be judicial acts from which no appeal will lie; yet, it is a general principle that appeals or writs of error may be taken only from judicial acts and decisions. Tested by this general principle, sales under orders and decrees, by persons designated by the court, are eminently judicial.

§ 25. Not only the decree or order of sale itself, but also the order of confirmation, which is the very essence of the sale, may be reviewed in an appellate court. The one conferring the power to sell; the other giving validity to the sale when agreed upon. For, though the order of confirmation is ordinarily a matter for the discretion of the court, yet it is such a reasonable and wholesome discretion, that if abused or unwisely exercised, the order may be appealed from. The New York Court of Appeals (SELDEN, Justice), in treating of the term *judicial*, use the following language: "The lines between the various departments are not and can not well be very precisely defined, and there are many duties which may be with equal propriety referred to either. Duties of this class, and they are very numerous, necessarily take their character from the departments to which they are respectively assigned. The same power which, when exercised by one class of officers not connected with the judiciary, would be regarded and treated as purely administrative, becomes at

¹ Watson's Adm'r v. Violett, 2 Duvall, 332. And so in England. Atty Genl. v. Day, 1 Ves. Sr. 218; Blagden v. Bradbear, 12 Ves. 466.

² Watson's Adm'r v. Violett, 2 Duvall, 332; Cazet v. Hubbell, 36 N. Y. 677; Requa v. Rea, 2 Paige, 339; Deaderick v. Watkins, 8 Humph. 520; Wood v. Mann, 3 Sumn. 318, 326; Gross v. Pearcy, 2 Pat. & H. (Va.) 483; Planter's Bk. v. Fowlkes, 4 Sneed, 461; Stimson v. Mead, 2 R. I. 541; Brasher v. Cortlandt, 2 John. Ch. R. 505.

once judicial when exercised by a court of justice. This is shown by the definitions uniformly given of the word judicial. Webster defines it thus: ‘Pertaining to courts of justice, as judicial power;’ and again: ‘Proceeding from a court of justice, as a judicial determination.’ Referring then to Bouvier, the learned Justice gives his definition as, ‘Belonging to or emanating from a judge as such, the authority vested in judges.’ The court then add that ‘Whatever emanates from a judge as such, or proceeds from a court of justice, is, according to these authorities, judicial.’”¹

§ 26. But from the sheriff’s sale, as such, made on execution, no appeal lies: He makes no judicial decision. It matters not to the contrary, that the writ of *fieri facias* is a judicial writ.² The sheriff who is to execute it is a ministerial, or executive, officer, and his acts in that respect are but ministerial. No appeal lies therefrom. Those acts and the sale growing out of the same, can only be questioned or assailed by some direct proceeding, except in those courts where the practice is to report the same for confirmation by the court, which are an exception to the general rule. In such cases, the sale is open to attack on the motion in court to confirm. And although when affirmed, they thereby partake of the character of judicial sales, notwithstanding their being made by the ministerial officer and on execution, yet these are exceptional cases and give no judicial character to ordinary sales on execution, which stand or fall on their own validity and in which no confirmation is required.

§ 27. So in Arkansas, judicial sales are held to be sales by the court. ENGLISH, J., in a mortgage foreclosure in chancery, says: “The theory of sales of this character is, that the court is of itself the vendor, and the commissioner or master is merely its agent in executing its will. The whole proceeding, from its incipient stage up to the final ratification of the reported sale, and the passing of the title to the vendee, and the money to the person entitled to it, is under the supervision and control of the court. The court will confirm or reject the reported sale, or suspend its completion, as the law and justice of the case may

¹ In the matter of Henry Cooper, 22 N. Y. 67, 82.

² 3 Bac. Abt. Title, Judicial writs which lie after judgment, 698.

require."¹ And the practice of confirmation prevails in said State.²

§ 28. The great body of the authorities recognize judicial sales as *sales by the court*. The nearest departure therefrom which we have met with is in *Redus v. Hayden*, 43 Mississipi, 614, 637, where, on that subject, the language of the High Court of Errors and Appeals of that State is: "More emphatically may it be said that (in England) the court is the vendor than under our system," and that they are "with us more like those made by the sheriff under executions, the most important difference being that the commissioner must report his proceedings and obtain the action of the court on them." But it is, notwithstanding, there again asserted that the authorities agree that there must be confirmation of sales made under a chancery or probate decree. Until confirmation, the transaction is *in fieri*, subject to the discretion and control of the court. But in the same case it is said to be a legal discretion, and that confirmation may not be refused for mere inadequacy of price.³ This ruling, however, as to inadequacy of price is clearly against the current of authorities in regard to judicial sales,⁴ and as a doctrine, is applicable only to execution sales at law, which will not be *set aside* for mere inadequacy of price. But in those States where execution sales are required by statute to be reported to the court for confirmation, such confirmation is matter of discretion in the court, and gross inadequacy of price *alone* will prevent confirmation; for it is not only the province of the court to see that all formalities are complied with, and to guard against fraud and unfairness or mistakes, but also to guard the rights of the parties against gross sacrifices, which may result as well to plaintiff as defendant, if the sum realized be not sufficient to satisfy the writ, and there be no other property liable thereto. Such sales

¹ Sessions *v.* Peay, 23 Ark, 39, 41, 42. In the case here cited the court refers to Tooley *v.* Kane, 1 S. & M. Ch. R. 522; Penn's Adm'r *v.* Tolleson, 20 Ark. 652; Deaderick *v.* Smith, 6 Hump. 146; and also cite Daniels' Chy. Practice, Vol. 2, 1447; Hoffman's Masters in Chancery, 216, in reference to the similar doctrine and practice in England and in New York.

² Sturdy *v.* Jacoway, 19 Ark, 499, 512.

³ 43 Miss. 614, 637. (But see to the contrary the ruling in the adjoining State of Tennessee, Lasell *v.* Powell, 7 Cold. 278, as recently as 1869.)

⁴ Cohen *v.* Wagner, 6 Gill. 236; Latrobe *v.* Herbert, 3 Md. Ch. Decs. 375; (See post, Sec. 129) and Lasell *v.* Powell, 7 Cold. 278.

do, in fact, in this respect, partake somewhat of the character of judicial sales, as they require judicial sanction.

Nor is it true in law, or in fact, that the most *important difference* between sales on decrees and sales on execution at law, is that the *commissioner* in the former must report his proceedings for the action of the court thereon, as is alleged *Redus v. Hayden* (*supra*). On the contrary, in the language of Judge REDFIELD, hereinbefore cited (See *Ante*, Sec. 2,) judicial sales or sales on decrees "bear but slight analogy to sheriff's sales, in this country or in England."

And we may here add, as we have elsewhere suggested, that the sheriff sells by authority of the law, and the law is his guide. The writ of execution merely empowers him to make the debt. It is the law that directs the sale to be made if the money be not paid, and the law also directs the manner thereof, as to notice and sometimes also as to place and time of sale. The court has no control over the sheriff, except by quashing the writ, or ordering its return into court, and can not even set the sale aside in those States where report and confirmation are not provided for, except on judicial proceedings set on foot directly for that purpose. Whereas, in judicial sales, or sales under orders and decrees, the property to be sold is described, and the manner of sale is directed, or ought to be, and the person appointed to sell is all the time subject to the court, and nothing is binding until by the court *confirmed*. Hence it is that the court is the *vendor*; and if not as *emphatically* so in the language of *Redus v. Hayden*, it is because some of the mere formulas are dispensed with, as intimated may be legally done (*Post*, Sec. 76), and not for want of any of the substantial features of what are strictly judicial sales, or sales by the court, and in which the court is the vendor. For even in the case referred to, as seemingly disposed to hold otherwise, it is broadly asserted that the main features of such sales still remain, which are that they are ordered or decreed by the court, and are of no effect until by the court confirmed. There is still another distinction. The decree of sale is merely interlocutory, made in the course of judicial proceedings, and the final decree is that of confirmation after the sale is made. The judicial sale occurs while the cause is still pending, but the execution issues and the execution sale is made *after* final judgment, and when the cause is ended. The sheriff sells what he can find, but the commissioner

sells only what he is ordered to sell. The buyer, by the latter, becomes a party to the proceedings, and is in court subject to its jurisdiction; but not so as to the purchaser at an execution sale at law.

§ 29. The court decreeing a judicial sale, has not only the authority to appoint at discretion some one to conduct the sale, who may be an officer of the court, as for instance, a master in chancery, or the sheriff; but may also appoint instead thereof a competent private person as commissioner to perform the same duties, and may, at discretion, change the same, and so may the court make such change, if held by a succeeding judge at any time before the trust is fulfilled;¹ for the person selling being therein the mere agent of the court², such agent may be changed at pleasure. He is not in that respect like an officer appointed by the law, holding under the law, and not under the court, and therefore only liable to be temporarily displaced by the court for misconduct or partiality, as a sheriff may be by appointment of an eligor. But his authority being conferred by the court, may by the court be terminated and conferred on another.³

Judicial sales occur in probate and in chancery proceedings for partition of real estate, where a division of the property can not be made in kind.⁴ In guardian and administration sales of land in probate;⁵ in mortgage foreclosures by equitable proceedings; proceedings to enforce vendors' liens;⁶ in statutory liens for street improvements made by municipal corporations;⁷ and we may add, whenever a right or proceeding is enforced, by a sale made by a judicial order or decree, under direction of the court as contradistinguished from sales on execution.

¹ *Meetze v. Padgett*, 1 Rich. (S. C.) N. Series, 127.

² *Mullikin v. Mullikin*, 1 Bland, 541; *Harrison v. Harrison*, 1 Md. Ch. Decs. 331; *Vandever v. Baker*, 13 Penn. St. 121, 126; *Wolfe v. Sharp*, 10 Rich. (S. C.) Law, 60, 63; *Gordon v. Saunders*, 2 McCord, Ch. 151.

³ *Meetze v. Padgett*, Supra.

⁴ *Sacket v. Twining*, 18 Penn. St. 202; *Hutton v. Williams*, 35 Ala. 503; *Girard Life Ins. Co. v. The Farmers & Mechanics' Bank*, 57 Penn. St. 388; *Williams' Case*, 3 Bland, 215; *Allen v. Gault*, 3 Casey, 473.

⁵ *Grignon's Lessee v. Astor*, 2 How. 338; *Moore v. Shultz*, 13 Penn. St. 98.

⁶ *Kershaw v. Thompson*, 4 Johns. Ch. 610.

⁷ *Ohio Life & Trust Co. v. Goodin*, 10 Ohio St. 557, 565; *Gould v. Garrison*, 48 Ill. 258; *Dillon, Municipal Corporations*, Sec. 660; *McInerny v. Read*, 23 Iowa, 410.

When the statute or local practice do not dispense with confirmation of such sales, the officer, commissioner, or person conducting them, acts as the instrument merely of the court, without authority to bind creditors, debtors, or heirs, simply by his own act, who are bound only by the action of the court, in final confirmation, the court alone having power to represent and bind them.¹

In certain classes of cases such sales, when perfected, are said to confer ownership on the purchaser, by a right paramount to that of the heir, as owner.² Thus, in administration sales of real estate to pay debts of decedents, the court ordering them enforces a lien in law, and acts in the exercise of a right paramount to that of the heirs. Without law there are no heirs. Heirship is not a natural right. It is created by law, is different in different States, and is changed or varied from time to time. The same law-making power that creates it, vests the property in the heir subject first to the prior right of creditors of the decedent, if there be not other sufficient assets, to have it sold for the payment of their debts, and also gives the court the paramount power of ascertaining the debts and selling the property to pay the same; so, also, for purposes of making partition.

This same power that confers heirship on next of kin, is equally powerful to confer it on a stranger—escheat it to the State—or destroy heirship and inheritance altogether, and leave the property of a deceased citizen as in primitive ages, to be enjoyed and possessed by the first taker.³ In the language of a well known legal maxim, “*Heir is a name of law, son a name of nature.*” Or, as the Latin expression is, “*Hæres est nomen juris, filius est nomen naturæ.*”⁴ Thus it is that the same authority—that is, the sovereign power which in some countries bestows heirship upon the *first born* of the males, and precludes

¹ Moore *v.* Shultz, 13 Penn. St. 102. (The court have this power by law, subject to which rights of property are holden.) Williamson *v.* Berry, 8 How. 547; Rawlings *v.* Bailey, 15 Ill. 178; Ayers *v.* Baumgarten, and Wright *v.* Phelps, 15 Ill. 444.

² Grignon’s Lessee *v.* Astor, 2 How. 338; Bofil *v.* Fisher, 3 Rich. Eq. 1; Sheldon *v.* Newton, 3 Ohio St. 494, 504; M’Pherson *v.* Cunliff, 11 S. & R. 426. (It is the title of the ancestor, or his right, that is acted on by the law, and by the court, the right of the heir attaches only to what is left. *Ibid.*)

³ 2 Bl. Com. 10, 11, 12, 13.

⁴ Branch’s Principia, 55.

liability of the land for the payment of a decedent's debts, may in others, as in our own, first devote it to the payment of the debts of the decedent, and apply it to such payment by sale, in its own way with or without notice to the contemplated heir, and at the same time provide for its descent, subject to such liability and trust to certain ones designated as heirs, to be divided among them in equal portions, instead of all going to the first male born, as in some parts of England. This system of primogeniture in England was favorable to the support of the crown under the feudal system then existing, whilst in the American States equal inheritance, subject to liability for debts, is favorable to free institutions as well as to the great sources of all prosperity among us, agriculture, trade and commerce, by securing to the largest number of persons an interest in the soil, and faithful payment of debts to creditors; without which latter all enterprise and credit must more or less languish. Nor does it matter to the contrary, of the unlimited power of the government to subject to sale a decedent's lands for his debts by summary proceedings in probate, with or without notice to the heirs, that the grant usually is to the grantee and *his heirs* forever; for that is upon the mere presupposition that the law will designate *heirs*, inasmuch as there are no heirs except by statute, and therefore a grant to A. B. and his heirs, means to A. B. and to those to whom the law at his decease directs inheritances of lands to descend as heirs, and provision of the law that such descent shall be subject first to the liability in law to be applied by the courts to payment of the decedent's debts, is valid.

§ 30. In *Myer v. McDougal*,¹ this paramount lien of creditors upon the lands of a deceased debtor, or other property of his estate, for payment of their debts, is fully recognized by WALKER, Justice, in the following terms: "The devise of the land to Elizabeth Hayden, by Robert Hayden, was subject to the payment of his debts; and the devisee and her grantees took and held the premises subject to such indebtedness, which operated as a lien upon them, and the creditors may enforce such lien by administration from heirs or devisees."

The court here cite *McCoy v. Morrow*,² as to the same effect,

¹ 47 Ill. 278, 280; *McCoy v. Morrow*, 18 Ill. 519.

² 18 Ill. 519.

and to the point that the lien must be enforced within a reasonable time.

A decree of sale, to effect a partition of interests, or to pay debts of a decedent, virtually takes possession of the estate, and vests it in the court for the purposes of distribution.¹ In the language of the court in *Williams' Case* just cited, "a decree for a sale to effect a partition, or to pay debts, virtually takes possession of the estate and vests it in the court for the purposes of distribution."

§ 31. Judicial sales, properly speaking, occur only in proceedings wholly or partly *in rem*.² In this respect they are widely contradistinguished from execution sales, at law, where the judgment is exclusively *in personam*, and wherein the sale is that of the officer and not that of the court.

§ 32. Some judicial sales are in proceedings purely *in rem*. Others are in proceedings partly *in rem* and partly *in personam*. In either case the order, or decree of sale, is *in rem*; it is against the property itself.

II. IN PROCEEDINGS PURELY IN REM.

§ 33. Proceedings purely *in rem* are where the court, in its plenary power of the law, based on legislative will and the authority of the government, lays hold of and acts directly on the property itself, and transfers its ownership to the purchaser by a title paramount to that of the owner, and "without regard to the persons who may have an interest in it."³ Such proceedings are not by virtue of any contract of the owner, express or implied, but "are analogous to proceedings in admiralty," and

¹ *Williams' Case*, 3 Bland. 215; *Beauregard v. New Orleans*, 18 How. 497, 503.

² *Grignon's Lessee v. Astor*, 2 How. 338; *Beauregard v. New Orleans*, 18 How. 497, 502, 503; *Florentine v. Barton*, 2 Wall. 210, 216.

³ *Grignon's Lessee v. Astor*, 2 How. 338; *Bofil v. Fisher*, 3 Rich. Eq. 1; *Sheldon v. Newton*, 3 Ohio St. 494; *Beauregard v. New Orleans*, 18 How. 497, 503; *Satcher v. Satcher*, 41 Ala. 26; *Florentine v. Barton*, 2 Wall. 216; *Spencer v. Sheehan*, 19 Minn. 338, 342, 343; *Montour v. Purdy*, 11 Minn. 384; *Cornett v. Williams*, 20 Wall. 226, 250; *Bank v. Dandridge*, 12 Wheat. 70.

"all the world are parties."¹ "The estate passes to the purchaser by operation of law."²

§ 34. The purchaser, it is said, claims not their title, but one paramount.³ The paramount right of the government to seize or lay hold of the property of decedents and distribute it in kind, or else, if that be impracticable by way of partition, then to sell the same and distribute the proceeds. Or by a still more stringent measure, if need be, to sell the same for payment of the ancestor's debts and distribute the proceeds to the extent of the debts among the creditors, to satisfy claims of a higher or paramount grade in law than the claim of the heirs. In the case cited from Alabama, *Satcher v. Satcher*,⁴ the Supreme Court of that State use the following language in reference to sales in probate: "It is the settled doctrine in the decisions of this court that the proceeding before the probate court, for the sale of lands of a decedent, is *in rem*; that the jurisdiction of the court attaches upon a petition setting forth a statutory ground of sale, and that the order of sale is not void, although the proceedings may abound in errors, if the petition contain the above stated jurisdictional allegations."

And in the same case, the doctrine is still more definitely asserted so as to expressly negative the necessity of notice or jurisdiction of the persons in interest, and say that "the proceedings in the probate court for the sale of decedent's lands is held, by a long chain of decisions not now to be questioned, to be *in rem*; and, therefore, the validity of the orders can never depend upon the fact that the court has acquired jurisdiction of the persons of the parties. The requisition of notice is just as plainly and as positively made in the act of 1822 as under any subsequent law. Under the act of 1822 the order of sale was not void on account of want of notice. It was so settled by the decisions of this court. We can not decide to the contrary unless we disregard the doctrine of *stare decisis* and overturn decisions

¹ *Bank v. Dandridge*, 12 Wheat. 70.

² *M'Pherson v. Cunliff*, 11 S. & R. 428; *Grignon's Lessee v. Astor*, 2 How. 388; 3 *Bouvier*, 131, 132.

³ *Moore v. Shultz*, 13 Penn. St. 102; *Grignon's Lessee v. Astor*, 2 How. 319; *Beauregard v. New Orleans*, 18 How. 502.

⁴ 41 Ala. 26; *Hornor v. Hanks*, 22 Ark. 572; *Williams v. Benedict*, 8 How. 112; *Haynes' Admr. v. Bessellieu*, 25 Ark. 499.

which constitute a rule of property under which millions of dollars worth of land are probably held.”¹

And in *Wyman v. Campbell*,² a still earlier decision of the same court, it is held that “the proceeding of the orphans’ court is *in rem*, against the estate of the intestate, and not *in personam*. The order by that court for the sale of real estate, so far as the question of jurisdiction is concerned, may well be compared to the condemnation of goods by a court of exchequer, where jurisdiction attaches upon a seizure — it merely professes to divest the title of the ancestor without affecting the persons or other property of the heirs.”

§ 35. The courts of Alabama thus very clearly recognize the paramount right of the government to act upon the title of the ancestor to the postponement of the heir. In such cases there are no adverse parties litigant. The rights of those previously interested in the property are transferred from the property to the fund produced by the sale.³ This is by the same right and power that enables the government to regulate descents, make distribution of estates, make partition, and to sell such property as is not divisible in kind, or may not be so distributed if personal.

§ 36. Such is the power of the government and courts in this respect, that the judicial arm reaches every possible interest. The rights of “unborn remainder men” and of persons “who are not before” the court, “may be concluded;” the court “acts upon the property” and the rights of parties in interest, as before stated, are “transferred from the property to the fund.” Such is the ruling and the language of the court in *Bofil v. Fisher* and kindred class of cases. In the case of *Bofil* the court

¹ *Satcher v. Satcher*, 41 Ala. 26, 39; *King v. Kent*, 29 Ala. 542; *Matheson v. Hearin*, 29 Ala. 210; *Field v. Goldsby*, 28 Ala. 218; *Wyman v. Campbell*, 6 *Porter*, 219; *M'Pherson v. Cunliff*, 11 S. & R. 430; *Lightfoot v. Doe, ex. dem. of Lewis*, 1 Ala. 479; *Sturdy v. Jacoway*, 19 Ark. 499; *Borden v. The State*, 6 English, 519; *Rogers v. Wilson*, 13 Ark. 507; *Bennett v. Owen*, 13 Ark. 177; *Rivers v. Thompson*, 43 Ala. 633; *King v. Kent*, 29 Ala. 542; *Downin v. Sprecher*, 35 Md. 474; *Dorsey's Lessee v. Garey*, 30 Md. 490; *Cockey v. Cole*, 28 Md. 276; *Schley's Lessee v. The Mayor and Council of Baltimore*, 29 Md. 34.

² 6 *Porter*, 219, 232; *Lynch v. Baxter*, 4 Tex. 431.

³ *Bofil v. Fisher*, 3 Rich. Eq. 1; *Defrees v. Greenham*, 11 Ohio St. 486; *Moore v. Shultz*, 13 Penn. St. 98; *M'Pherson v. Cunliff*, 11 S. & R. 430; *Knotts v. Stearns*, 1 Otto, 638.

say: "To say that the court could not, under circumstances like these, convey away the fee, would be to assert a doctrine that would render conditional limitations and contingent remainders an intolerable evil to a growing and prosperous community."

§ 37. By such proceedings and sales, in probate, to pay a decedent's debts, where jurisdiction has attached, the purchaser, in some of the States, holds the lands freed from all liens and claims, save dower, in the resulting interest of decedent's heirs in the dower lands, and except such liens as are of such a character that the amount thereof can not be rendered certain (as for instance, to suppose a case, a life annuity) so that the same may be paid off out of the proceeds of sale.¹

§ 38. In probate sales to pay debts, this rule of paramount right in the court extends to creditors and heirs only, and not to adverse claimants of title otherwise than through the heirs.²

§ 39. Though this plenary power of the proper court over the real estate of a deceased debtor may seem unwarranted and anomalous at the first view, yet it is not more so than is the power which the law gives the administrator or executor over the personal effects, which he may sell and dispose of for the payment of debts, without regard to the heirs, who are, nevertheless, in either case, entitled to the property, if there be no debts, or it be not sold in the course of administration.

We are not unmindful that the personality is said to vest in the executor or administrator. But not unconditionally; only for a purpose; and *quere* as to the administrator? For, if so, must it rest in abeyance until his appointment? His title is more in the nature of authority to collect, preserve, and, if need be, or the law require it, to sell. All which is without any notice to the heirs, and is by force of the same law and law-making authority that decides who shall be heirs.

The power to confer heirship implies power also to define the terms on which it shall be conferred.

§ 40. The doctrine laid down in Pennsylvania, that judicial sales discharge all liens susceptible of being ascertained to a cer-

¹ *Moore v. Shultz*, 13 Penn. St. 102, 103; *Grignon's Lessee v. Astor*, 2 How. 388; *West v. Townsend*, 12 Ind. 434; *Western Penn. R. R. Co. v. Johnston*, 59 Penn. St. 290, 294. In this last case the court say: "It is a familiar principle that a judicial sale extinguishes liens, not estates or interests of third persons." *Cadmus v. Jackson*, 52 Penn. St. 295.

² *Shields v. Ashley*, 16 Mo. 471.

tainty, is not to be understood as assuming to vacate or destroy, but rather to discharge the same out of the proceeds of sale according to priority, so as to close the title to the purchaser.¹ And sales made in proceedings for partition being in their nature judicial sales, have the same effect.² Hence, the court held, in

¹ Girard Life Ins. Co. v. Farmers & Mechanics' Bank, 57 Penn. St. 388, 396, and see Miller's Exrs. v. Greenham, 11 Ohio St. 436.

² Girard Life Ins. Co. v. Farmers & Mechanics' Bank, 57 Penn. St. 394, 395. In this case the court say on this subject: "We come, then, to the more general question, whether a sale in partition by writ discharges the lien of a mortgage on the undivided interest of one of the parties. A sale in partition is always for the purpose of enabling division. It is authorized only when it has been determined that the land, which is its subject, can not be divided according to the command of the writ 'without prejudice to, or spoiling the whole.' When that appears, the law directs a sale in order to convert that which is impartible into an equivalent that is capable of distribution. Such a sale is eminently judicial—more strictly so than is a sale by a sheriff under an execution. It is made under an order of the court; its subject is in the hands of the court, and the proceeds are necessarily brought into court for distribution. The act of 1799 requires that the moneys or securities realized from the sale 'shall be brought into court,' to be distributed. The whole proceeding is more directly the act of the court than is any other sheriff's sale, where the officer acts under instructions of the attorney, and where he may, and often does, distribute the purchase money of the property sold, without any supervision or direction of the court. That Orphans' Court sales in partition are judicial sales, was decided in Sackett v. Twining, 6 Harris, 202, and recognized in Jacob's Appeal, 11 Harris, 477. I am not aware that it has been directly decided whether a sale in partition by writ in a common law court is judicial or not, though Allen v. Gault, 3 Casey, 473, substantially rules that it is. But without any positive determination, it is impossible to doubt that it is to be so regarded. It certainly has everything which in other cases is regarded necessary to make a sale judicial, and it is even less under private control than almost any other which is confessedly such. Next, it is to be observed that judicial sales in this State discharge all liens. This is a rule of almost universal application. There are, indeed, some exceptions to it, created by express statutory enactment, and others growing out of the peculiar character of the lien or encumbrance; but it has long been regarded as sound policy that property purchased at a judicial sale should pass into the hands of the purchaser clear of all mere liens. Exceptions to the rule are allowed only from necessity. If property be thus sold, the chances are greatly increased that it will bring its full value, thus benefiting alike the owners and lien creditors. Sales in partition have never been recognized as exceptional, and it is not easy to discover any reason why they should be. In them it is as much for the interest of the owners of the land, and for holders of liens upon it, or parts of it, that purchasers shall not be compelled to look after incumbrances, as it is in any other judicial sale. And incumbrancers have the same notice that is given to them in ordinary cases of sales under a *venditioni exponas*. They have no reason to complain, therefore, if their liens be discharged from the land, and

the case of the Girard Life Ins. Co. that the sale in partition under the statute, though the statute makes no provision to such effect, discharged a prior mortgage lien upon the partitioned premises.¹

§ 41. In Illinois it is held that a proceeding on *fieri facias* to foreclose a mortgage under the statute, is a proceeding *in rem* and not *in personam*.

In such case the practice is for the court to find the amount due against the defendant and order a sale of the mortgaged premises on special execution.² The sale, however, is none the less a judicial sale, for the judgment and writ name the property to be sold, and the condemnation of the property is by judgment *in rem*, although personal judgment is sometimes also given against the defendant.

§ 42. Judicial sales in Louisiana are, as we have before seen, sales by the court, in the strictest sense. They are of no validity until confirmed by the court, which act of confirmation is better known there as *homologation* of judgment, or sale.

§ 43. The sale of lands there judicially made, in probate, extinguishes mortgage liens and other liens thereon, and the purchaser, if need be, will be protected by injunction against such liens. The judicial sale can never be questioned, except by

attached to its full equivalent, the proceeds of the sale. Surely a sale in partition should not be taken out of the general rule which regulates judicial sales and their consequences without some controlling reason. Exceptions are not to be multiplied unnecessarily."

¹ Girard Life Ins. Co. v. Farmers & Mechanics' Bank, 57 Penn. St. 388, 396, 397. The court, in this case, quoting the language in Willard v. Norris, 1 Rawle, 64, that "nothing could more clearly show how notorious is the rule that in every judicial sale in Pennsylvania the land goes to the purchaser clear of all judgments and mortgages, and that out of the purchase money the sheriff, at his own risk is to pay off all these liens, according to their priority, in so much that, though the act of assembly about partitions makes no mention of liens, yet by analogy drawn from the notorious usage of the commonwealth, an allowance was adjudged to the sheriff for the fees paid for search as of judgments and mortgages, the owners of which might afterwards call upon him for the money." The court add: "For these reasons we hold that a sale made in partition by writ under act of 1799 does discharge the lien of judgments and mortgages upon the land sold, having the ordinary effect of other judicial sales." But a different rule in regard to incumbrances seems to prevail in Illinois. In McConnel v. Smith, 39 Ill. 289, it is said that, "As a general rule, subject it may be to some exceptions, a purchaser at an administrator's sale acquires it (the property) with all the incumbrances to which it is liable."

² Williams v. Ive, 49 Ill. 512.

a direct proceeding gotten up for that purpose; and the lien debts so extinguished by the sale, are to be satisfied in their order out of the proceeds of the sale.¹

§ 44. And so the judicial sale in said State, under mortgage decree, extinguishes all junior mortgages; and such junior mortgages can proceed thereafter against their debtor by personal proceedings and judgment.²

§ 45. But a sale under mortgage on order of seizure after the death of the debtor, and without a day in court to the administrator, is void, for a want of jurisdiction.³

§ 46. In sales in partition, mere irregularities may be waived by those in interest as recipients of the proceeds of sale, and so by the court, so that the buyer can not thereafter, by reason of such irregularities, object to taking the property.⁴

So, irregularities are cured by homologation, or confirmation, of the sale, done on writ of monition to those in interest.⁵

§ 47. Sales in probate in Louisiana, of a minor's lands, are illegal if procured on application of a foreign guardian. But though for illegality sufficient to avoid the sale, the purchaser may avoid it before payment and full compliance, yet the onus is on him to show such illegality.

§ 48. The party selling —as for instance an administrator— can not buy, except in cases of sales by surviving partners of a deceased person whose succession is being sold, then the seller may by statute buy.⁶

§ 49. In selling two parcels of land in probate under one decree, the proceedings should show the sum brought by each; but it is a sufficient showing in that respect, that the report shows the aggregate amount brought by the two, and also the

¹ Wooley *v.* Russ, 24 La. Ann. 482; Succession of Harkins, 2 La. Ann. 923; Succession of Day, 2 La. Ann. 895. (The purchaser is not bound to look behind the decree) Millie *v.* Herbert, 19 La. Ann. 58; Wright *v.* Cummings, 19 La. Ann. 353; Succession of Wadsworth, 2 La. Ann. 966; Gibson *v.* Foster, 2 La. Ann. 503.

² Willis *v.* Willis, 22 La. Ann. 447.

³ Surgi *v.* Colmer, 22 La. Ann. 20.

⁴ Chalon *v.* Walker, 7 La. Ann. 477; D'Arensbourg *v.* Chauvin & Levois, 9 La. Ann. 98; Savage *v.* Williams, 15 La. Ann. 250; Succession of Hebrard, 18 La. 485; Succession of Gurney, 14 La Ann. 632.

⁵ Succession of Gassen *v.* Palfrey, 9 La. Ann. 560; Succession of Coleman, 11 La. Ann. 109.

⁶ Savage *v.* Williams, 15 La. Ann. 250.

sum brought by one of them, leaving thus the balance as the price of the other.¹

§ 50. Though ordinarily, sales in probate are at auction to the highest bidder, by public sale, yet under the statute of Louisiana of 1869, the probate court may order the sale of a minor's lands; for partition, by private agreement, by homologating (that is affirming) family arrangements agreed on for such private sale; and this, too, notwithstanding the general statute on the subject, Article 341 of the Code requiring sales of minor's property to be at public auction.²

§ 51. Where the sale is unexceptionable, then, whether a judicial or an execution sale, the purchaser, by declining to comply therewith, renders himself liable for the loss, if resold for a less sum than his bid; and a re-sale may be made at his risk.³

§ 52. Creditors have a general lien on all their deceased debtors' property which is liable for debt, upon general principles, and none may have a preference, unless he has a specific lien. Succession of Hawkins, 2 La. Ann. 923.

III. IN PROCEEDINGS PARTLY IN REM, AND PARTLY IN PERSONAM.

§ 53. Judicial sales, in proceedings partly *in rem* and partly *in personam*, are where the proceedings are of a mixed nature, being directly against the property and also, personal against the owner, as in proceedings to foreclose deeds of mortgage by judicial sale.⁴ In such cases, there is a proceeding *in rem* against the property, and at the same time personal process against the mortgagor to bring him as defendant into court. A decree in this class of cases and sale thereon only confers title as against the parties to the suit.⁵

§ 54. The decree of foreclosure and sale is partly *in rem*, being directly against the property;⁶ whilst so much of it as

¹ Succession of Armat, 20 La. Ann. 340.

² Durand *v.* Dubuclet, 24 La. Ann. 155.

³ New Orleans Insurance Co. *v.* Ruddock, 22 La. Ann. 46; Thompson *v.* Cullinane, 22 La. Ann. 586; Guillotte *v.* Jennings, 4 La. Ann. 242.

⁴ Kershaw *v.* Thompson, 4 John. Ch. 609; Downing *v.* Palmateer, 1 T. B. Mon. 64.

⁵ Haines *v.* Beach, 3 John. Ch. 459.

⁶ Kershaw *v.* Thompson, 4 John. Ch. 609.

bars the right of redemption is *in personam*, divesting the defendant, as it does, of the personal right to redeem. The proceeding is predicated upon the defendant's contract of indebtedness and mortgage, and not upon the plenary power of the court over the subject matter, irrespective of the parties in interest. Yet the sale is none the less a judicial sale, and the sale of the court. The deed, where the record of the mortgage is regular, relates back and confers title by relation to the date of the mortgage as against intervening claims.

§ 55. In some of these cases, for instance when the defendant is not found, but is brought in by publication, the proceedings assume very nearly the features of those which are purely *in rem*. But there is still a difference; for the debt and mortgage deed exist in contract and are no less the basis of the proceeding than they are when the defendant is brought personally into court.

§ 56. The judicial sale involved in the case of *Minnesota Co. v. St. Paul*,¹ was conducted by the United States marshal, but not by virtue of his powers of office under the law. It was no less judicial as made by him than it would have been if made under direction of a master. The court ordering the sale clothed him, in virtue of the order, with a master's powers in that particular. In considering the case of *Minnesota Co. v. St. Paul*, the United States Supreme Court, speaking of the marshal's appointment, say that he was "directed to make the sale instead of a master commissioner;" and that the sale so made "was confirmed by the order of the district court." Yet as other property and more was sold than was included in the decree, the court held the sale of that part which was not included in the decree invalid notwithstanding its confirmation. The Supreme Court attribute the confirmation, as to the excess, to an oversight, and do not decide positively as to the power of a court to confirm in such a sale, with knowledge of the departure from the decree, but remark that "cases in this (Supreme) court would seem to decide that it can not,"² and they refer to *Shriver v. Lynn*³ and *Gray v. Brignardello*.³

¹ *Minnesota Co. v. St. Paul*, 2 Wall. 640, 641. And in *Gaines v. New Orleans*, 6 Wall. 714, the Supreme Court of the United States hold that a probate court "could not by a subsequent order give validity to sales made by executors which were null and void by the law of the State when they were made."

² 2 How. 43.

³ 1 Wall. 637.

The sale, then, which was here brought in question was clearly a judicial sale, though made by the same person who exercised the office of marshal, or if selected by the marshal, for it was competent for the court to so designate and appoint him. This sale is regarded by the Supreme Court of the United States as judicial, wherein they liken it to a "master's sale" in this, "that a purchaser or bidder at a master's sale" subjects himself "*quoad hoc* to the jurisdiction of the court," and that therefore the purchasers were estopped to deny being within the jurisdiction of the court as parties in the litigation in the case.¹

§ 57. It is the policy of the law to uphold judicial sales, and to protect purchasers under them, where jurisdiction has attached in the tribunal making the sales; and they will not be affected in a collateral inquiry, or otherwise, than on writ of error, or appeal for such error or irregularity.²

¹ Minnesota Co. v. St. Paul Co., 2 Wall. 634.

² Dorsey v. Kendall, 8 Bush. 294.

CHAPTER II.

JURISDICTION OF THE COURT ORDERING JUDICIAL SALES OF
REAL PROPERTY; AND HOW TITLE PASSES

- I. THE JURISDICTION IS LOCAL.
- II. JURISDICTION IS POWER TO HEAR AND DETERMINE.
- III. THERE MUST BE JURISDICTION OF THE SUBJECT MATTER AND OF THE PARTICULAR CASE.
- IV. TITLE PASSES BY OPERATION OF LAW.

I. THE JURISDICTION IS LOCAL.

§ 58. Jurisdiction of real property can only be obtained by the tribunal of the country wherein the property is situated. Lands lying in one State can not be reached or sold under an order license, or decree of a court of another and different State. The jurisdiction is local. The *lex loci rei sitæ* governs.¹

II. JURISDICTION IS POWER TO HEAR AND DETERMINE.

§ 59. Jurisdiction in the court is power to "hear and determine" the particular cause involved.² If this power to hear and

¹ Watts *v.* Waddle, 6 Pet. 400; Story, Conflict of Laws, Secs. 19, 20, 538, 543; Nowler *v.* Coit, 1 Ohio, 236; Brown *v.* Edson, 23 Vt. 435; *Ex parte* Reid, 2 Sneed, 375; Rogers *v.* McLain, 31 Barb. 304; Tardy *v.* Morgan, 3 McLean, 358; McCormick *v.* Sullivant, 10 Wheat. 192; Wilkinson *v.* Leland, 2 Pet. 627, 655; Price *v.* Johnson, 1 Ohio St. 390; Blake *v.* Davis, 20 Ohio, 231; Latimer *v.* Union Pacific R. R. Co., 43 Mo. 105; City Ins. Co. of Providence *v.* Commercial Bank of Bristol, 68 Ill. 348.

² United States *v.* Arredondo, 6 Pet. 709; Grignon's Lessee *v.* Astor, 2 How. 338; Beauregard *v.* New Orleans, 18 How. 502, 503; Wilder *v.* City of Chicago, 26 Ill. 182; Sheldon *v.* Newton, 3 Ohio St. 494; Smiley *v.* Sampson, 1 Neb. 56, 70. In Grignon's Lessee *v.* Astor, the United States Supreme Court say: "The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action; if the petitioner presents such a case in his petition, that on a demurrer the court would render a judgment in his favor, it is an undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing a petition containing all the requisites, and in the manner required by law. 6 Pet. 709. Any movement by a court is necessarily the exercise of jurisdiction. So, to exercise any judicial power over the subject matter and the parties, the question is, whether, on the case before the court, their action

determine the particular case does not exist in the court in point of law, then there can be no jurisdiction of the case.

If it does exist, then to confer actual jurisdiction of the particular case or subject matter thereof, the jurisdictional power of the court must be invoked or brought into action by such measures and in such manner as is required by the local law of the tribunal. When this is done, it is then *coram judice*. If this be not done, there is at least error, if not want of validity in the proceedings.

§ 60. The manner of conferring actual jurisdiction of the particular case is variously modified and regulated by the enactments of the different States in regard to notice and matters of practice, and which should severally be conformed to as necessary to give validity to the proceedings. To effect this, the petition or plaint must be such as is sustainable on demurrer.¹

§ 61. But although such conformity, as to notice and other matters of practice, may not appear to have existed from the record itself, yet if jurisdiction of the particular cause fully attached by such petition as is sustainable on demurrer, then the

is judicial or extra judicial, with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it. 12 Pet. 718; 3 Pet. 205. It is a case of judicial cognizance, and the proceedings are judicial. 12 Pet. 623. This is the line which denotes jurisdiction and its exercise. In cases *in personam*, where there are adverse parties, the court must have power over the subject matter and the parties; but on a proceeding to sell the real estate of an indebted intestate, there are no adversary parties, the proceeding is *in rem*, the administrator represents the land, 11 S. & R. 432; they are analogous to proceedings in the admiralty, where the only question of jurisdiction is the power of the court over the thing, the subject matter before them, without regard to the persons who may have an interest in it; all the world are parties. In the orphans' court, and all courts who have power to sell the estates of intestates, their action operates on the estate, not on the heirs of the intestate; a purchaser claims not their title, but one paramount. 11 S. & R. 426. The estate passes to him by operation of law. 11 S. & R. 428. The sale is a proceeding *in rem*, to which all claiming under the intestate are parties, 11 S. & R. 429, which directs the title of the deceased. 11 S. & R. 430."

¹ Morse *v.* Goold, 11 N. Y. 281; Jackson *v.* Babcock, 16 N. Y. 246; Gibson *v.* Roll, 30 Ill. 172; Johnson *v.* Johnson, 30 Ill. 215; United States *v.* Arredondo, 6 Pet. 709; Reddick *v.* The State Bank of Illinois, 27 Ill. 147; Alabama Conference *v.* Price, Exr., 42 Ala. 49; Grignon's Lessee *v.* Astor, 2 How. 338; Goudy *v.* Hall, 30 Ill. 109; Whitney *v.* Porter, 23 Ill. 445; Mason *v.* Messenger, 17 Iowa, 268; Smiley *v.* Sampson, 1 Neb. 56, 70.

existence of notice and other incidental requirements will be inferred after judgment or decree; and the question in regard to the same will not be open to collateral inquiry. The record, including the presumptions in law, so arising therefrom, will be received, on collateral inquiry, as verity.¹

III. THERE MUST BE JURISDICTION OF THE SUBJECT MATTER AND OF THE PARTICULAR CASE.

§ 62. The power of the court, as we have seen, over the property or subject matter referred to in the proceeding must be invoked over the particular case by a petition good upon demurrer; and so it must, by personal notice or service, where, by statute, the latter is essential to confer jurisdiction.²

¹ *Morrow v. Weed*, 4 Iowa 77; *Grignon's Lessee v. Astor*, 2 How. 319; *Reeves v. Townsend*, 2 Zab. 396; *Paul v. Hussey*, 35 Maine, 97, 100; *Fox v. Hoyt*, 12 Conn. 491; *Wilson v. Wilson*, 18 Ala. 176; *Sheldon v. Newton*, 3 Ohio St. 495; *Simpson v. Hart*, 1 John. Ch. 91; *Davenport, etc. v. Schmidt*, 15 Iowa, 213; *Hart v. Jewett*, 11 Iowa, 276; *Frazier v. Steenrod*, 7 Iowa, 339; *Myer v. McDougall*, 47 Ill. 278; *Carter v. Waugh*, 42 Ala. 452; *Merritt v. Horne*, 5 Ohio St. 318; *Rhode Island v. Massachusetts*, 12 Pet. 657. The court, in the case of *Grignon's Lessee v. Astor*, add on this subject that, "The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence, the court having power to make the decree, it can be impeached only by fraud in the party who obtains it. 6 Pet. 729. A purchaser under it is not bound to look beyond the decree, if there is error in it of the most palpable kind; if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law. These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction; they are not inferior courts, in the technical sense of the term, because an appeal lies from their decisions." Pp. 340, 341.

² *Alabama Conference v. Price*, 42 Ala. 49, and ante p. 23, n. 1; *Cooper v. Sunderland*, 3 Iowa, 114; *Moore v. Neil*, 39 Ill. 256; *Frazier v. Steenrod*, 7 Iowa, 339; *Torrance v. Torrance*, 53 Penn. St. 505; *Long v. Burnett*, 13 Iowa, 28; *Sheldon v. Newton*, 3 Ohio St. 495; *Stokes v. Middleton*, 4 Dutch, 32; *Gerrard v. Johnson*, 12 Ind. 636; *Carter v. Waugh*, 42 Ala. 452; *Satcher v. Satcher's Admr.* 41 Ala. 26.

If, however, notice be required by law, then if the record shows that the court adjudicated the matter of notice, and found service had been made, or necessarily did so, in the action of the court therein, then that question becomes *res adjudicata*, and will be treated as settled when collaterally brought in question.¹ So if the decree be not appealed from, it is valid, although the petition be defective.²

§ 63. The action of the court and the notice of sale, as also the sale itself, must be of and concerning the same subject matter described in the petition. If the want of such conformity appears, as if the petition be in reference to one tract of land, and the decree, sale, or notice of sale, be of another and different one, then no title will pass by the sale. The proceedings, so far as the sale is concerned, will be a nullity. In *Frazier v. Steenrod*, the order of sale and the notice of sale were for entirely different tracts of land, and the court held the sale void, although the sale was of the tract described in the order, and the sale and deed had been approved by the probate court.³

§ 64. The principle of *caveat emptor* applies, and the buyer must look out for himself.⁴ No mere error, however, or irregularity, will affect the validity of the sale on collateral inquiry. The remedy for these is by appeal, if one be by law allowed; and if not allowable, then the adjudication and proceedings are final, and so far as respects such errors or irregularities are valid;⁵ then the record is absolute verity in all collateral proceedings if jurisdiction has properly attached.⁶

¹ *Tharp v. Brenneman*, 41 Iowa, 251.

² *Read v. Howe*, 39 Iowa, 553, 559.

³ *Frazier v. Steenrod*, 7 Iowa, 340; *Weed v. Edmonds*, 4 Ind. 468; *Wheatley v. Tutt*, 4 Kan. 195.

⁴ *Vandeveer v. Baker*, 13 Penn. St. 126.

⁵ *Goudy v. Hall*, 30 Ill. 109; *Grignon's Lessee v. Astor*, 2 How. 319, 340; *Morrow v. Weed*, 4 Iowa, 77; *Thompson v. Tolmie*, 2 Pet. 169; *Todd v. Dowd*, 1 Met. (Ky.) 281; *Frazier v. Steenrod*, 7 Iowa, 339; *Pursley v. Hays*, 22 Iowa, 11; *Boswell v. Sharp*, 15 Ohio, 447; *Walker v. Morris*, 14 Geo. 323; *Elliott v. Peirsol*, 1 Pet. 340; *Dingledine v. Hershman*, 53 Ill. 288; *Beauregard v. New Orleans*, 18 How. 497.

⁶ *Grignon's Lessee v. Astor*, 2 How. 340; *Sheldon v. Newton*, 3 Ohio St. 494; *Beauregard v. New Orleans*, 18 How. 341; *Thompson v. Tolmie*, 2 Pet. 157, 165; *Goudy v. Hall*, 30 Ill. 109; *Shriver's Lessee v. Lynn*, 2 How. 43; *Covington v. Ingram*, 64 N. C. 123; *Woods v. Lec*, 21 La. Ann. 505; *Southern Bank of St. Louis v. Humphreys*, 47 Ill. 227; *Parker v. Kane*, 22 How. 14; *Alexander v. Nelson*, 42 Ala. 462; *Dequindre v. Williams*, 31 Ind. 444.

§ 65. If the court be one of general jurisdiction, and the property be within its jurisdictional territorial limits, then it has power to take jurisdiction of the cause and of the subject matter. Or if it be a court of general jurisdiction, over subject matter of only a limited description, yet its jurisdiction is general *pro tanto*, and the same power exists in the court, over such subject matter, when jurisdiction has actually attached, as if the court were a court of unrestricted general jurisdiction; and the same presumptions then arise from the record as from the record of a court of full general jurisdiction.¹ And if there be no appeal, the adjudication is final.

§ 66. In either case, the court being thus clothed with legal capacity to take jurisdiction of the subject matter, then to give it actual jurisdiction, and also jurisdiction of the particular case, whether *in personam*, or *in rem*, there must be filed a petition, or bill, or what else stands in lieu thereof, correctly describing and identifying the property sought to be affected or sold, and also avering such facts as are necessary to the proper action of the court,² to enable it to make the order of sale and sale. The facts are sufficient, if good, on demurrer.

§ 67. If the proceedings be also *in personam*, with intent to bind the person of the party proceeded against, as well as to act *in rem* upon the property, as is sometimes the case, then there must be, to make a personal judgment valid, personal service on the owner of the property, so as to get jurisdiction of the person. Without such personal service or notice, if there be no appearance, any judgment or decree *in personam* will be void. But the judgment or decree *in rem* will be binding, notwithstanding.

§ 68. If, however, the proceeding be purely *in rem*, then such other notice, if any, as is required by the local law, must be given, and this, too, in addition to the filing of a petition. The latter is to confer jurisdiction of the particular case. But such notice will be inferred after decree if there is no statute requiring it to appear in the record, and the contrary if its existence

¹ *Fursley v. Hays*, 22 Iowa, 11; *Grignon's Lessee v. Astor*, 2 How. 339; *Beauregard v. New Orleans*, 18 How. 502, 503.

² *Ibid.*; *Jackson v. Robinson*, 4 Wend. 437; *Weed v. Edmonds*, 4 Ind. 468; *Finch v. Edmonson*, 9 Texas, 504; *Shriver's Lessee v. Lynn*, 2 How. 43; *Morrow v. Weed*, 4 Iowa, 77; *Elliott v. Peirsol*, 1 Pet. 340; *Satcher v. Satcher's Admr.* 41 Ala. 26.

be not ascertainable from the record and proceedings of the case, and jurisdiction shall have actually attached by a petition, with proper averments and allegations sustainable on demurrer.¹

§ 69. If the proceedings be *in rem* for the sale of a decedent's lands, and no notice as a condition to the validity of the sale be by law required, then none is necessary to such validity, but only as against error, although a directory law may require notice. "The power of the court"² is over the property or thing before it, "without regard to the parties who may have an interest in it. All the world are parties." The estate passes then by operation of law. The power of the law lays hold of it through the court, and passes the title by a right paramount to the right of heirs;³ and, as we conceive, a right which underlies all titles. The same right and power that enables the State to establish heirship and decide who shall be a dead man's heirs, that same power may well seize on, and first apply the property to payment of the decedent's debts, and leave the heirship or inheritance to be of the residue only, and to be holden by a right which the law postpones until the debts are paid.

§ 70. In Wisconsin, where the case of *Grignon's Lessee v. Astor* originated, the State courts, seemingly, repudiate the

¹ *Grignon's Lessee v. Astor*, 2 How. 319, 340; *Simpson v. Hart*, 1 Johns. Ch. 91; *Cooper v. Sunderland*, 3 Iowa, 114; *Stokes v. Middleton*, 4 Dutch, 32; *Sheldon v. Newton*, 3 Ohio St. 494; *Cornett v. Williams*, 20 Wall. 226; *Bank v. Dandridge*, 12 Wheat. 70; *Postlewaite's Appeal*, 68 Penn. St. 477.

² In *Beauregard v. New Orleans*, 18 How. 497, the court say: "And when the object is to sell the real estate of an insolvent or embarrassed succession, the settled doctrine is there are no adversary parties. The proceeding is *in rem*. The administrator represents the land. They are analogous to proceedings in admiralty where the only question of jurisdiction is the power of the court over the thing—the subject matter before them—without regard to the parties who may have an interest in it. All the world are parties. In the Orphans' Court, and all the courts which have power to sell the estates of decedents, their action operates on the estate, not on the heirs of the intestate. A purchaser claims not their title, but one paramount. The estate passes by operation of law."

³ *Grignon's Lessee v. Astor*, 2 How. 319, 338; *Beauregard v. New Orleans*, 18 How. 497, 503; *Satcher v. Satcher's Admir.* 41 Ala. 26; *Sheldon v. Newton*, 3 Ohio St. 494; *M'Pherson v. Cunliff*, 11 S. & R. 432; *Perkins v. Fairfield*, 11 Mass. 227; *Saltonstall v. Riley*, 28 Ala. 164; *Paine v. Mooreland*, 15 Ohio, 442; *Robb v. Irwin*, 15 Ohio, 698; *Benson v. Cilley*, 8 Ohio St. 614; *Borden v. The State*, 6 Eng. 519; *Tongue v. Morton*, 6 Har. & J. 23; *Rice v. Parkman*, 16 Mass. 328; *Wilkinson v. Leland*, 2 Pet. 657; *Sohier v. Mass. Genl. Hos.* 3 *Cush.* 487.

rulings in that and its kindred cases, and hold that in proceedings in probate by an administrator for sale of a decedent's lands to pay debts, the record should show notice to the heirs at law to have been given according to the requirements of the statute; and that in the absence of such showing the sale cannot be sustained, even in a collateral proceeding.¹

But the previous case of *Stark v. Brown*,² referred to in *Gibbs v. Shaw*, as basis for the latter ruling, does not accord with the latter. It is not in point. For although the court hold therein that to confer jurisdiction and make a valid decree and sale, the heirs must be made parties and must be brought into court by notice or by some legal means or other; yet, the case in *Stark v. Brown*, in which this ruling is made, was a case of foreclosure of a mortgage, brought against the administrator of the deceased mortgagor, in which the heirs at law were not made parties, while the case of *Gibbs v. Shaw* was a proceeding in probate by the administrator to sell a decedent's lands under the statute for payment of debts.

¹ *Gibbs v. Shaw*, 17 Wis. 197. In this case, PAYNE, J., delivers the opinion of the Supreme Court of Wisconsin in the following terms: "Without passing upon any of the other objections to the validity of the sale of real estate by the first administrator, Wells, we think that sale must be held void, because the record fails to disclose any notice to the heirs at law of the time and place of hearing the application. The statute required such notice to be given before any such application should be heard. Statutes of 1839, p. 317, Sec. 29. The record offered to sustain that sale contains no proof whatever that any notice was given. The only thing upon which it could be assumed is a fragment of a recital in the order granting the license, to the effect that it appeared to the judge that the notice had been 'published in the Wisconsin Enquirer,' but leaving blanks at all the places where the facts should have been specified, showing such publication to have been according to the statute. And without determining whether a complete recital of all the facts necessary to show a proper notice in an order granting a license by a probate judge would be sufficient to sustain the proceedings, in the absence of any other proof of notice in the record, it seems clear that such a recital as this can not be so, it being evidently incomplete on its face, and failing to show or even recite the necessary facts. The question then is, whether an administrator's sale, under a license from the probate court, can be sustained where the record fails to show notice to the heirs at law as required by the statute. And we are of the opinion that it can not be. There may be some cases where it is intimated that such notice is not jurisdictional. But we regard the opposite doctrine as established by the weight of authority, and resting upon the soundest principles, and that it is also established that the records of probate courts must show jurisdiction in order to sustain their proceedings."

² 12 Wis. 582.

The court expressly draw this distinction between the two cases, in delivering the opinion in *Stark v. Brown*, and decline to discuss or decide upon the correctness of the ruling in *Grignon's Lessee v. Astor*.¹ To illustrate which we subjoin in a note so much of the opinion in *Stark v. Brown* as bears upon that point.²

Now, the State court case, which seemingly overruled *Grignon's Lessee v. Astor*, is not a parallel case; being a case for foreclosure of a mortgage it rested in contract and was pros-

¹ 12 Wis. 572, 582, 583. One class of these cases — sales in probate — rest on the paramount power of the courts and of the law; the other case — *Stark v. Brown* — rests in a mortgage contract.

² "Counsel relied upon the case of *Grignon's Lessee v. Astor*, 2 How. 319, as establishing the proposition 'that in a proceeding to sell the real estate of an indebted intestate, there are no adversary parties, the proceeding is *in rem*, and the administrator represents the land,' etc. It is true that the court, in that case, asserted that doctrine, and held that the provision in the statute requiring notice to be given to the parties interested before the court should pass upon the application, did not affect its jurisdiction. Whether that is the law or not in this State with respect to sales by administrators, we shall not now attempt to decide. It is certainly not in conformity with a long list of adjudications that might be cited, among which are the following: *Bloom v. Burdick*, 1 Hill, 130; *Sherry v. Denn*, 8 Blackf. 542; *Givan v. McCarroll*, 7 S. & M. 351; *Lessees of Adams v. Jeffries*, 12 Ohio, 253; *Messenger v. Kintner*, 4 Bin. 97; *Schneider v. McFarland*, 2 Comst. 459; *Bank v. Johnson and others*, 7 S. & M. 449. But we do not feel called upon to discuss the correctness of that decision for the reason that it must be held to relate only to a proceeding by an administrator, under the statute, to sell the real estate for the payment of debts. When the court said that the administrator represented the land, they meant in that proceeding. And it would be entirely unwarrantable to say that they intended to assert that he represented it for all purposes, so that a foreclosure suit, to which he alone was a party, would divest the right of the heirs. There is a great difference between the two cases. In the one the statute expressly authorizes and requires him to proceed for the purpose of making a sale. The design is to pay the debts of the estate, which is one of his most important duties. In the other case it is conceded that there is no statute expressly requiring or authorizing him to be made a party to a foreclosure, and his character as a representative of the land for that purpose is sought to be derived entirely from the rights which the law gives him as to the possession and as to obtaining a license to sell on a certain contingency. Even if the case in 2d Howard should be held to establish the doctrine that on the direct statutory proceeding by him to effect a sale for the payment of debts, he is to be considered as the representative of the land for all the parties interested, so that the judgment would not be void, though such other parties had no notice, we do not by any means think it can have that effect with respect to foreclosure suits, or any other, by which the title to property is sought to be affected."

ecuted in the court of general chancery jurisdiction according to the practice in adverse litigation, while that of Grignon's Lessee and its kindred cases are conducted in probate, under the special enactments conferring probate powers over the land of a decedent.

§ 71. Notwithstanding these rulings, some of which are by the highest court in the nation, and which we conceive to be the better doctrine, there are numerous decisions to the contrary, wherein it is held that jurisdiction is in all cases alike necessary over both the subject matter of the proceeding and of the persons of those in interest; and, therefore, decrees and sales without jurisdiction in some manner first obtained, as well of the person, as of the particular case, are simply void.¹

§ 72. This question as to the necessity of personal jurisdiction in probate for sale of a decedent's lands came up in the Iowa Supreme Court, at December term, 1869, in *Good v. Norley*.²

After great deliberation and a full investigation of the adjudications, the court were equally divided as to whether jurisdiction of the person of those in interest is necessary, under the Iowa statute, to the validity of an administrator's sale of lands for payment of a decedent's debts. By reason of such diversity of opinion the decree appealed from was affirmed, and, also, by one of the Justices deciding that jurisdiction had attached in the probate court over the persons of those now appealing to the Supreme Court. The principles of this case has been since concurred in by a full court.³

IV. TITLE PASSES BY OPERATION OF LAW.

§ 73. Title passes to the purchaser at judicial sale by opera-

¹ *French v. Hoyt*, 6 N. H. 370; *Dakin v. Hudson*, 6 Cow. 222; *Babbit v. Doe*, 4 Ind. 356; *Doe, Dem. of Platter, v. Anderson*, 5 Ind. 34; *Sibley v. Waffle*, 16 N. Y. 185; *Doe, Dem. of Mitchell, v. Bowen*, 8 Ind. 198; *Bloom v. Burdick*, 1 Hill. 140; *Sheldon v. Wright*, 5 N. Y. 518; *Ridgney v. Coles*, 6 Bosw. 486; *Corwin v. Merritt*, 3 Barb. 341; *Stark v. Brown*, 12 Wis. 572; *Sitzman v. Pacquette*, 13 Wis. 291; *Gibbs v. Shaw*, 17 Wis. 197.

² 28 Iowa, 188.

³ *Rankin v. Miller*, 43 Iowa, 11.

tion of law.¹ So it does from the ancestor to the heir,² but subject first to the paramount right of government, through its courts, to apply it to payment of ancestral debts,³ without notice to any one, if such shall be the legislative policy.

§ 74. The government has the same power to direct the sale of lands for debts, before or after the owner's death, as it has to declare heirship by law, without which there would be no heirship and no inheritance. We conceive that the power to do the one and the other, and also to make sales in partition, is found in a paramount right in government which underlies all title, and to which all title is subject, for the public good.⁴

¹ 3 Bouvier, 181, 132; M'Pherson *v.* Cunliff, 11 S. & R. 428; Grignon's Lessee *v.* Astor, 2 How. 338; Sheldon *v.* Newton, 3 Ohio St. 494; Vansyckle *v.* Richardson, 13 Ill. 171.

² Bank of Hamilton *v.* Dudley's Lessee, 2 Pet. 523; Drinkwater *v.* Drinkwater's Adm. 4 Mass. 358; Sheldon *v.* Newton, 3 Ohio St. 474; Vansyckle *v.* Richardson, 13 Ill. 171.

³ Bank of Hamilton *v.* Dudley's Lessee, 2 Pet. 532; Nowell *v.* Nowell, 8 Greenl. 222; Drinkwater *v.* Drinkwater's Admr. 4 Mass. 358; Vansyckle *v.* Richardson, 13 Ill. 171; Wolf *v.* Robinson, 20 Mo. 459; Stillman *v.* Young, 16 Ill. 318; Sheldon *v.* Newton, 3 Ohio St. 494; Wilkinson *v.* Leland, 2 Pet. 627; Watkins *v.* Holman, 16 Pet. 25; Gore *v.* Brazier, 3 Mass. 523.

⁴ In Vansyckle *v.* Richardson, 13 Ill. 173, the court say: "The real estate descends to the heir with this charge resting upon it. He can not incumber or alien it to the prejudice of the rights of creditors. He acquires a vested, but not an absolute interest in the land. He takes a defeasable estate, liable to be defeated by a sale made by the administrator in the due course of administration. He has no just claim to the land until the indebtedness of his ancestor is fully discharged. He acquires an absolute title only to what remains after the debts are extinguished."

CHAPTER III.

JUDICIAL SALES OF REAL PROPERTY IN GENERAL.

- I. BY WHOM TO BE MADE.
- II. HOW TO BE MADE.
- III. WHO MAY NOT BUY.
- IV. NOTICE OF SALE: ADJOURNMENT.
- V. CONFIRMATION.
- VI. WHEN TITLE PASSES.
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- XII. HOW ENFORCED AGAINST THE PURCHASER.
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- XIV. RATIFICATION BY THE PARTY AFFECTED.
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- XVI. NOT AFFECTED BY MERE IRREGULARITY.
- XVII. HOW PURCHASER AFFECTED BY SERVITUDES AND EASEMENTS.
- XVIII. THE MAXIM CAVEAT EMPTOR APPLIES.
- XIX. DECREE FOR SALE NOT AFFECTED BY CHANGE OF GOVERNMENT.
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- XXI. JUDICIAL SALE OF TRUST ESTATE OF MINORS.
- XXII. SALES AFTER AN APPEAL IS TAKEN.
- XXIII. OPENING THE BIDDING FOR AN ADVANCE BID.

I. By whom to be made.

§ 75. It is a general principle, applicable to all judicial sales, that they are to be conducted, unless differently provided by statute, by a person designated for that purpose in the license, order, or decree, or under his immediate direction and superintendence; but he may employ an auctioneer to cry the sale, if it be done in his presence.¹

If there be two or more commissioners appointed to sell, the sale must be made by them all. One alone, or less than the

¹ Williamson *v.* Berry, 8 How. 495, 544; Blossom *v.* R. R. Co., 3 Wall. 205; Reynolds *v.* Wilson, 15 Ill. 394; Heyer *v.* Deaves, 2 Johns. Ch. 154; Gould *v.* Garrison, 48 Ill. 260. The decree must be conformed to and the statute regulating execution sales does not apply. Blakey *v.* Abert, 1 Dana, 185.

whole number, is not sufficient, if there be nothing in the decree or the statute authorizing sale by a less number than the whole.¹

"Such sales," say the court, in *Blossom v. Railroad Company*,² "must be made by the person designated in the decree, or under his immediate direction and supervision, but he may employ an auctioneer to conduct the sale, if it be made in his presence."

And in a subsequent part of the same decision the court say: "Judicial sales are always regarded as under the control of the court, subject to the power to set them aside, or to open the biddings at any time before the sale is confirmed, if there be proper ground for such interference;" and that "even after the sale is made, it is not final until a report is made to the court and it is approved and confirmed."³

II. HOW TO BE MADE.

§ 76. The sale is to be at public auction and to the highest real bidder,⁴ unless it be otherwise authorized by the court, as is sometimes done. It must be for cash, unless the court order other terms, which it may do if deemed more beneficial to those in interest.⁵ But it must be for money, whether for cash in hand or on a credit. If the transaction should be for any other consideration, it would be but a barter.⁶ "Sale," say the Supreme Court of the United States, "is a word of legal import both at law and in equity. It means at all times a contract between parties to give and to pass rights of property for money, which the buyer pays, or promises to pay, to the seller, for the thing bought and sold."⁷ In the same case, *Williamson v.*

¹ *Gross v. Pearcey*, 2 Pat. & Heath, 483.

² 3 Wall. 205.

³ *Ibid.*; *Covington and Lexington R. R. Co. v. Bowler's Heirs*, 9 Bush. 468.

⁴ *Veazie v. Williams*, 8 How. 154; 2 Kent Com. 537, 538.

⁵ *Foster v. Thomas*, 21 Conn. 285; *Reynolds v. Wilson*, 15 Ill. 396; *Sedgwick v. Fish*, Hop. Ch. 594.

⁶ *Sedgwick v. Fish*, Hop. Ch. 594; *Reynolds v. Wilson*, 15 Ill. 394; *Maples v. Howe*, 3 Barb. Ch. 611; *Foster v. Thomas*, 21 Conn. 285; *Williamson v. Berry*, 8 How. 496, 544; *Noy, Max. Ch. 42*; *Bigley v. Risher*, 63 Penn. St. 155; *Huthmacher v. Harris' Admr.* 2 Wright, (Pa.) 498; *Hilliard, Sales*, 1230; *Shep. Touch*. 244.

⁷ *Williamson v. Berry*, 8 How. 496, 544; *Noy, Max. Ch. 42*; *Bigley v. Risher*, 63 Penn. St. 155; *Huthmacher v. Harris' Admr.* 2 Wright, (Pa.) 498; *Hilliard, Sales*, 1230; *Sedgwick v. Fish*, Hop. Ch. 594. By the court: "The suggestion

Berry, the court, further, as to the manner of selling, say: "The usual mode of selling property under decree or order in chancery is a direction that it shall be sold with the approval of a master in chancery, to whom the execution of the decree in that particular has been confided. It matters not whether the sale is public or private by a person authorized to make it. Not that the approbation of the master in either case completes a title to the purchaser. It is only the master's approval of the sale, and is one step toward getting a title. Before, however, he can get a title, he must get a report from the master that he approves the sale, or that he was the best bidder, accordingly as the sale may have been made privately or at auction. That report then becomes the basis of a motion to the court by the purchaser that his purchase may be confirmed."¹ * * *

The court, then, after laying down certain premises not material to our immediate subject, add, that "we have been thus particular," (in reference to the sale and the master's duties,) "for the purpose of showing the office of the master in relation to a sale, and what is meant by subjecting a sale to the approval of a master, and to show that such a sale, until approved by the master and confirmed by the court, gives no title to a purchaser of an estate which he may have bargained to buy. We do not mean to say that such cautionary proceedings upon sales under decrees and orders in chancery may not be dispensed with by a special order of the chancellor to pretermit them, but that such are the proceedings when no special order has been given."²

§ 77. Several persons may join together and lawfully bid as a unit, if done in good faith. "It is not every joint bidder or partnership among bidders at a sale under a decree in chancery (say the court in *Holmes v. Holmes*) that is corrupt and fraudulent. Such joint or partnership bidding may be perfectly legitimate."³

that credit may produce a higher price, is equally applicable to all sales. But judicial sales are not in general made on credit without the consent of parties."

¹ Williamson *v. Berry*, 8 How. 546.

² Ibid.

³ *Holmes v. Holmes*, 3 Rich. Eq. 61; *Smith v. Greenlee*, 2 Dev. L. 128; *National Bank v. Sprague*, 20 N. J. Eq. 159, 169. In the case of *Holmes v. Holmes*, it is said: "To render them unlawful and void, there must be a fraudulent intent to depress and chill the sale, to obtain the property at an under value,

But combinations to advance or reduce the price of the property, and all by-bidding, is illegal and fraudulent.¹ A minimum price may be fixed and made public, below which the property will not be allowed to go, and if made public it will not be legally objectionable. But without being made public, it is in itself fraudulent.²

§ 78. By-bidding is fraudulent. It deceives. It misleads. It involves a falsehood. In the language of the United States Supreme Court, in *Veazie v. Williams*,³ it "violates, too, a leading condition of the contract of sales at auction, which is that the article shall be knocked off to the highest real bidder without puffing."

§ 79. The court will sometimes appoint a bidding to prevent an estate from going under value, on special showings to the court.⁴

§ 80. Judicial sales are in no wise subject to the operation of either valuation laws or redemption laws fixed by statute relative to sales at law on writs of execution,⁵ unless the statute declare them so.

§ 81. In *Woods v. Monell*,⁶ Chancellor KENT lays down the rule in execution sale, "that where a tract of land is in parcels, distinctly marked for separate and distinct enjoyment, it is in general the duty of the officer to sell by parcels, and not the whole tract, in one entire sale." This rule has been previously asserted in *Rowley v. Webb*, in *Executors of Stead v. Course*,

or to obtain other undue and unconscientious advantages. An estate might be offered for sale which neither of two joint bidders would be able separately to purchase. Or, it might be that neither of two joint bidders, though able as to pecuniary means, would desire to purchase the whole of the estate offered for sale, though each would be desirous to become the owner of a part. Such persons, if not permitted to unite in their bidding, would not enter into the competition at all. To adopt so stringent a rule as that contended for, in reference to sales in chancery, would, in many instances, have the effect of diminishing instead of enhancing the prices."

¹ *Veazie v. Williams*, 8 How. 154; *Holmes v. Holmes*, 3 Rich. Eq. 61.

² *Veazie v. Williams*, 8 How. 153; 2 Kent, Com. 538, 539; *Ross on Sales*, 311.

³ 8 How. 154; 2 Kent, Com. 538, 539.

⁴ 2 Daniel's Chy. 1268.

⁵ *Blakey v. Abert*, 1 Dana, 185; *Gould v. Garrison*, 48 Ill. 258.

⁶ 1 Johns. Ch. 505; *Woodhull v. Neafie*, 1 Green's Ch. 409; *Johnson v. Garrett*, 1 C. E. Green, 31; *Corles v. Lashley*, 2 McCarter, (N. J.) 116.

and is referred to by Chancellor KENT with approbation in *Woods v. Monell*.¹

§ 82. Unless there be special reasons to the contrary (or the court otherwise direct,) the sale, when made in parcels, should be made in such order as the debtor may desire.² But it is the duty of the person selling to sell in such order as will be likely to produce the largest amount for the smallest quantity of lands, in his best judgment. But he must exercise a sound discretion.

Ordinarily, where a judicial sale of several lots or parcels of land is being made to satisfy a money decree, it is the duty of the referee or person conducting the sale not only to sell in parcels, but to also respect the wishes of the debtor as to the order in which the lots should be sold, if there is no good reason to believe such order of sale will prove injurious.³

And if the debtor and creditor can not agree upon the order in which the property shall be sold, either party may apply to the court for instruction to the referee, and if deemed proper, they will be given.⁴ Such sales proceed under the control and supervision of the court, and it will "scrutinize the conduct of a party" placed in a position where he may sacrifice the interest of another in a manner not easily to detect. "The unfortunate debtor," say the court, in *King v. Platt*, "is not beneath its protection." And "it will not tolerate the slightest advantage over him."⁵

§ 83. "It is clearly competent for the court to prescribe the mode and terms" of sale, "provided it requires as much * * as the statute contemplates," and these requirements must be conformed to by the person conducting the sale.⁶ And so, also, in regard to the place of sale.⁷ If made at a different place than the one ordered, it will be invalid; the purchaser can not enforce

¹ Am. Ins. Co. *v.* Oakley, 9 Paige, 259; *Woods v. Monell*, 1 Johns. Ch. 505; *Runyon v. Newark In. Rub. Co.*, 4 Zabr. 473; *Penn v. Craig*, 1 Green, Ch. 495; *Mohawk Bk. v. Atwater*, 2 Paige, 54; *Meeker v. Evans*, 25 Ill. 322; *Rowley v. Brown*, 1 Binney, 61; *Executors of Stead v. Course*, 4 Cranch, 403; *Laughlin v. Schuyler*, 1 Neb. 409.

² *King v. Platt*, 37 N. Y. 155.

³ *Ibid.*; *Caufman v. Sayre*, 2 B. Mon. 202, 209.

⁴ *King v. Platt*, 37 N. Y. 155.

⁵ *Ibid.* and *Collier v. Whipple*, 13 Wend. 229, 230.

⁶ *Reynolds v. Wilson*, 15 Ill. 394; *Wheatley v. Tutt*, 4 Kan. 195; *Gould v. Garrison*, 48 Ill. 258; *Williamson v. Berry*, 8 How. 544.

⁷ *Talley v. Starke*, 6 Gratt. 339.

it, if opposed, and will not be compelled to perfect it if he objects.¹ And, *quere*, if even confirmation of a sale so made at an unauthorized place, will render it valid.² If the manner and time of sale are not prescribed by the decree, then they are vested in the sound discretion of the person or officer selling.³

§ 84. So far as the terms and conditions of sale are not regulated by the decree, the master or person charged with the conduct of the sale may "adopt such means to prevent sham bidding" as have a tendency to promote fairness and to prevent fraud, and which may give confidence to fair and honest bidders as to their being justly dealt with.⁴ But all such regulations, as also the action and conduct of the person conducting the sale, are subject to the scrutiny of the court, whose judicial sanction thereof may be given, or denied, at discretion, and confirmation ordered or refused accordingly.

§ 85. A sale made under the statute of Indiana which submits the matter of selling in parcels to the judgment of the officer or person conducting the sale, will not be set aside by reason of the land not being sold in parcels, unless it be made to appear that the action of the officer was in that respect fraudulent. Unless it be made to appear that the officer selling acted otherwise than in accordance with his honest judgment, and in a fraudulent manner, the purchaser has a right to the benefit of his purchase.⁵

§ 86. When separate parcels of land are contiguous to each other, and being properly offered, no bid is received for them separately, they may then be sold together, but subject to the discretion of the court ordering the sale.⁶ There is a constitutional provision in Texas that sales of land under *decrees* of courts must be made or offered in lots of not less than ten nor more than forty acres, except of lands situated in towns and cities; but this is held not to apply to sales of lands on writs of execution emanating from personal judgments at law, but only to sales made in proceedings *in rem*.⁷ Thus virtually recognizing, in

¹ Talley *v.* Starke, 6 Gratt. 339; Bethel *v.* Bethel, 6 Bush. 65, 69.

² Minnesota Co. *v.* St. Paul Co., 2 Wall, 609; Bethel *v.* Bethel, 6 Bush. 65.

³ Blossom *v.* R. R. Co., 2 Wall. 196, 208.

⁴ National Bank of the Metropolis *v.* Sprague, 20 N. J. Eq. 159, 165, 166.

⁵ Wright *v.* Yetts, 30 Ind. 185, 188.

⁶ Martin *v.* Hargadine, 46 Ill. 322

⁷ Fisk *v.* Varnell, 39 Texas, 73.

the courts of that State the line of distinction between *execution* and *judicial* sales.

§ 87. Whereby the terms of the decree for the sale of lands, the commissioner appointed to sell is required to give bond to account for the proceeds of sale, and to pay the same over to those entitled to it, such requirement implies authority in the commissioner to receive the purchase money instead of its being paid in to court, and in such cases payment to the commissioner will exonerate the purchaser from further liability for the purchase money.¹

§ 88. And if the sale be by the tract, and not by the acre, a deficiency in the supposed quantity will neither entitle the purchaser to avoid the sale nor to have a deduction of the amount of the purchase money if there be no fraud.²

III. WHO MAY NOT BUY.

§ 89. The person selling may not buy. Nor any person concerned or employed in selling, unless by leave obtained from the court.

The rule is sweeping, and extends to all agents, commissioners, trustees, guardians, administrators, executors, and others, whether selling under decree, or order of Court, or otherwise, where others are interested in the property or in the proceeds of sale. They can not be buyer and seller; bidder and crier; nor combine other like incompatible capacities in one and the same transaction; common honesty and morality forbid it.³

In *Michoud v. Girod*, the Supreme Court of the United States characterize this principle in the following language: "The rule, as expressed, embraces every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the person with whom he is dealing, or on whose account he is acting, and his own individual interest." The general rule, the court say, "Stands upon the great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity."⁴ In

¹ Jones *v. Tatum*, 19 Gratt. 720.

² *Ibid.*

³ *Martin v. Hargadine*, 46 Ill. 322.

⁴ *Davou v. Fanning*, 2 Johns. Ch. 252; *Michoud v. Girod* and others, 4 How. 555; *Wormley v. Wormley*, 8 Wheat. 421; *Ringo v. Binns*, 10 Pet. 269; *Oliver v. Piatt*, 3 How. 333; *Kruse v. Steffens*, 47 Ill. 114; *McConnell v. Gibson*,

such conflict the law interposes and prohibits the party from selling to himself, and buying from himself, that which his duty requires him to sell for account of others.

Such is the doctrine laid down in the case of *Michoud v. Girod* after a careful examination and review of the conflicting cases, and which the court lay down as not only the rule in England, but that which, since the decision in *Davoue v. Fanning*,¹ has triumphed "over all qualifications and relaxations in the United States to the same extent that has been achieved for it in England by the great chancellor, Lord ELDON." Such purchases are now uniformly regarded by courts, both of law and equity, as not only against the policy of the law, as has been said, but also as against the law itself, and as totally inconsistent with fair dealing. They can in no case be maintained unless made by leave of the court, on formal application therefor.²

§ 90. Thus, where a railroad is sold under a mortgage fore-

12 Ill. 128; *Thorp v. McCullum*, 6 Ill. 627; *Pensonneau v. Bleakley*, 14 Ill. 15; *Wickliff v. Robinson*, 18 Ill. 145; *Robbins v. Butler*, 24 Ill. 387; *Dennis v. McCagg*, 32 Ill. 429; *Miles v. Wheeler*, 43 Ill. 123. "The fact that the person entrusted by the law to make the sale becomes the purchaser, whether by direct or indirect means, creates such a presumption of fraud as requires the sale to be vacated if application is made in proper time. The rule is regarded as firmly established by this court, and it is deemed unnecessary to review the authorities or to discuss the reason of the rule."—*Kruse v. Steffens*, 47 Ill. 114, 115. *Michoud v. Girod*, 4 How. 503; *Prevost v. Gratz*, 6 Wheat. 481; *Richardson v. Jones*, 3 Gill. & J. 163; *De Caters v. Le Ray De Chaumont*, 3 Paige, 178; *Brackenridge v. Holland*, 2 Blackf. 377; *Case v. Abeel*, 1 Paige, 393; *Haddix v. Haddix*, 5 Litt. 202; *Davis v. Simpson*, 5 Har. & John. 147; *Dorsey v. Dorsey's Heirs*, 3 Har. & John. 410; *Stallings v. Foreman's Admir.*, 3 Hill, (S. C.) Eq. 307; *Ely v. Horine*, 5 Dana, 398; *Saltmarsh v. Beene*, 4 Porter, 283; *Hawley v. Cramer*, 4 Cow. 718; *McClanahan v. Chambers*, 1 T. B. Mon. 44; *Field v. Arrowsmith*, 3 Hump. 442; *Torrey v. The Bank of Orleans*, 9 Paige, 650; *Iddings v. Bruen*, 4 Sand. Ch. 239; *Dobson v. Racey*, 3 Sandf. Ch. R. 60; *Ward v. Smith*, 3 Sand. Ch. R. 592; *Fellows v. Fellows*, 4 Cow. 682; *Ex parte Wiggins*, 1 Hill, (S. C.) Eq. 241; *Yeackel v. Litchfield*, 13 Allen, 417; *Estate of Millenowich*, 5 Nev. 161. (But in the latter case the sale was permitted to stand as matter of interest to the estate.) *Nelson v. Hayner*, 66 Ill. 487; *McCreedy v. Mier*, 64 Ill. 495; *Coat v. Coat*, 63 Ill. 73; *Williams v. Walker*, 62 Ill. 517; *Case v. Carroll*, 35 N. Y. 385; *Covington & Lexington R. R. Co. v. Bowler's Heirs*, 9 Bush. 468; *Hamblin v. Warnecke*, 31 Tex. 91; *Potter v. Smith*, 36 Ind. 231.

¹ 2 Johns. Ch. 252.

² *Michoud v. Girod*, 4 How. 503; *Wormley v. Wormley*, 8 Wheat. 421; *Prevost v. Gratz*, 6 Wheat. 481; *Remick v. Butterfield*, 11 Foster, (N. H.) 70; *Beeson v. Beeson*, 9 Barr. 297.

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closure, a *director* in the company may not buy at the sale, except by special leave of the court; and if he does, he will be treated in equity as a trustee for the company, and be compelled to render up the road, and the sale will be rescinded, notwithstanding it may have been confirmed.¹ In such case, the director occupying a fiduciary position is a trustee for the stockholders and creditors, and is bound to exercise his trust with his best judgment for the interest of those concerned, which obligation and duty, and his interest as a purchaser or contemplated purchaser at the sale, are incompatible with each other.²

Nor will the ordinary time of statutory limitation in regard to actions at law bar a proceeding in equity to enforce such a *trust* as against pretended rights thus having their foundation in fraud. It requires some substantial act of acquiescence on the part of the complainants evidencing an intention to abide by the sale, and thereby causing such investment or outlay of the purchaser, or those claiming under him, as will in equity render it as against conscience to void the sale.³ Nor will the insolvency of the company whose road is thus sold be any obstacle in the way of enforcing the proceeding to set the sale aside and restore the property.⁴

§ 91. A purchaser under such fraudulent director, who buys with knowledge of the directorship of his grantor, or under such circumstances as charge him in law with knowledge, or as are calculated to put a prudent man on inquiry, is in no better condition than his grantor; and a *special* and unusual warranty in his conveyance against the property being taken away from him by any proceeding antagonistic to the title thus obtained, that the grantor will refund the purchase money, is in equity evidence of knowledge.⁵

§ 92. One whose duty it is to discharge a debt, or any portion thereof, may not buy at a sale brought about by his own dereliction of duty in not paying as his obligation requires.

Thus, where the cashier of a bank bought, at the sale for a debt which the bank was bound to pay for the debtor, it was held, that whether he purchased for himself, or for the bank, the

¹ Covington & Lexington R. R. Co. v. Bowler's Heirs, 9 Bush. 468.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid. and p. 495.

sale could not stand. The court, in disposing of the question, say: "The general interests of justice" require "that purchases made by persons holding a fiduciary situation in relation to the sale should be set aside in all cases, if application is made in a reasonable time," and that the purchaser should not be permitted to hold his purchase.¹ It were a fraud upon the debtor for those whose duty to him required them to pay the debt, to buy at a sale caused by their own default.

§ 93. While in South Carolina, the broad and general principle, that a trustee selling, can not buy at his own sale, has always been recognized and enforced,² yet the decisions there have conflicted as to whether administrators or executors are included within the inhibition.³ In some of the earlier cases, it is held that subject to the condition of having acted with fairness, executors and administrators are not within the inhibition.⁴ Thereafter, until 1839, the rulings were unsettled and conflicting, when, by statute (in 1839) it was provided that executors and administrators might become purchasers at their own sales, subject to confirmation of the court, but would be charged with the full value of the property if purchased for less than the true value.⁵

§ 94. In Arkansas, an agent, or trustee, or other person concerned in selling, can not buy the property confided to his charge. If he does, the sale is fraudulent on its face.⁶

If a purchase be made in violation of this rule, the sale will be set aside irrespective of value, or of actual fraud, and an order of resale will be made, starting it at the bid of such improper purchaser. If it does not bring more, then the sale so previously made will be affirmed; but if it bring more than the exceptionable sale, it is to be vacated.⁷

§ 95. The doctrine that the person selling can not buy, nor

¹ *Torrey v. The Bank of Orleans*, 9 Paige, 649.

² *Huger v. Huger*, 9 Rich. (S. C.) Eq. 217, 225; *Farr v. Sims*, Rich. Eq. Cases, 138; *Zimmerman v. Harmon*, 4 Rich. Eq. 165; *Sollee v. Croft*, 7 Rich. Eq. 34; *Ex parte Wiggins*, 1 Hill. Ch. (S. C.) 251.

³ *Huger v. Huger*, 9 Rich. *Supra*.

⁴ *Drayton v. Drayton*, 1 Des. (S. C.) Eq. 557; *Stallings v. Foreman*, 2 Hill. Ch. (S. C.) 307.

⁵ *Huger v. Huger*, 9 Rich. Eq. 217, 225.

⁶ *White v. Ward*, 26 Ark. 445; *Rogers v. Lockett*, 28 Ark. 290; *Imboden v. Hunter*, 23 Ark. 622.

⁷ *Imboden v. Hunter*, 23 Ark. 622.

can his trustee, is as early as the books of English jurisprudence, and runs through the whole body of the law, and has uniformly prevailed as a general principle to the present time. It was asserted in New Jersey, by analogy to the English rulings, as long ago as 1790, and holds equally good whether the sale be a judicial one, or be ministerial, as on writ of execution, or be made in discharge of a trust.¹

And if a purchase was made in violation of this rule of law, the deed was held void, even collaterally, on trial at law.²

§ 96. The reason of the rule that forbids the purchase by one concerned in selling, and which, as we have seen, applies as well to the auctioneer or cryer as to the administrator, or other person controlling the sale, or proceedings, applies with equal force to prevent such persons becoming purchasers under even an otherwise acceptable bidder after acceptance of the bid and before confirmation of the sale; if the rule in this respect be violated, the sale is voidable upon general principles,³ and in New York, under the Revised Statutes, is *absolutely void*, as so declared by the statute and held by the courts.⁴

§ 97. So, in Georgia, as a general rule, the seller may not buy

¹ Arrowsmith *v.* Vanharlingen's Exr., 1 N. J. (Coxe) 26; Den Ex. dem. Wright *v.* Wright, 7 N. J. 175; Den Ex. dem. Obert *v.* Hammel, 18 N. J. 74, 81; Brown *v.* Litton, 10 Mod. 20, 21; Walley *v.* Walley, 1 Vern. 484; Keech *v.* Sandford, 1 Sel. Cas. Ch. 61; *Ex parte* Bennett, 10 Ves. Jr. 381.

² The cases above cited; and Den *v.* McKnight, 6 Hals. 393; Winter *v.* Geroe, 1 Hals. Ch. 319; Mulford *v.* Bowen, 1 Stock. Chy. 797, 798; Scott *v.* Gamble, 1 Stock. Ch. 235; Obert *v.* Obert, 2 Stock. Ch. 98; Warbass *v.* Armstrong, 2 Stock. Ch. 263; Obert *v.* Obert, 1 Beasley, Ch. 423; Huston *v.* Cassidy, 2 Beasley, Ch. 228; Blauvelt *v.* Ackerman, 5 C. E. Green Ch. 141; Hull *v.* Voorhis, 45 Mo. 555; Thornton *v.* Irwin, 43 Mo. 153; Charleville *v.* Chouteau, 18 Mo. 492; Wasson *v.* English, 13 Mo. 176; Jamison *v.* Glascock, 29 Mo. 191; Lich *v.* Bernecker, 34 Mo. 93; Beal *v.* Harmon, 38 Mo. 435; Allen *v.* Ransom, 44 Mo. 263; Boardman *v.* Florez, 37 Mo. 459; Grumly *v.* Webb, 44 Mo. 444; Thomas *v.* Zumbalen, 43 Mo. 471; Pairo *v.* Vickery, 37 Md. 471; Smith *v.* Townshend, 27 Md. 383; Hill on Trustees, 247, and note; Korns *v.* Shaffer, 27 Md. 83; Cumberland Coal and Iron Co. *v.* Sherman, 20 Md. 133, 134. (To ratify such sale, by those affected with it, there must be full knowledge, and plain and deliberate act of ratification, see last cases above cited.) Rickets & Whittington *v.* Montgomery, 15 Md. 46; Cannon *v.* Jenkins, 1 Dev. Eq. 422; Stilly *v.* Rice, 67 N. C. 178; Ermond *v.* Faircloth, Conference R. (N. C.) 550, 551; and 1 Murphy, (N. C.) 35.

³ Forbes *v.* Halsey, 26 N. Y. 65; Terwilliger *v.* Brown, 44 N. Y. 237. See also sec. 89 and note.

⁴ Terwilliger *v.* Brown, 44 N. Y. 237, 241.

at his own sale. If, however, the purchase be by an executor, administrator, or guardian, at his own sale, it is not *absolutely void*, but is merely voidable at the option of those persons whose interests or title are affected by the sale.¹

§ 98. But the election to *avoid* the sale must be exercised within a reasonable time;² an acquiescence of twenty years is held to have ratified the sale.³

IV. NOTICE OF SALE. ADJOURNMENT.

§ 99. The notice of sale, as to manner and time, must be such as the order and statute directs, and must correctly describe the property. If given different in manner, or for less time than required by the law or the decree, the sale will be void; and so, if there be a substantial misdescription of the property.⁴

§ 100. But if the discrepancy is not apparent in the proceedings, or is not made to appear by other evidence, the presumption of law is, after the sale is confirmed, that no such discrepancy existed; and, therefore, this presumption, after confirmation, may not be rebutted in a collateral proceeding.⁵

§ 101. Notices by posting up in public places are presumed to perish as soon as they have "discharged their office." Therefore, secondary evidence of them and their purport is admissible.⁶

§ 102. Where notice was given in the particular manner required, and there were no bidders, an adjourned sale made on a slightly variant notice, but from fair motives, was held valid.⁷

§ 103. But if there is no particular notice prescribed by the decree, then such reasonable notice should be given as will be calculated to give publicity and secure fair competition; and if

¹ Worthy *v.* Johnson, 8 Geo. 236; Mercer *v.* Newsom, 23 Geo. 151; Bond *v.* Watson, 22 Geo. 637.

² Smith *v.* Granberry, 39 Geo. 381; Grubbs *v.* McGlawn, 39 Geo. 672; Flanders *v.* Flanders, 23 Geo. 249; Shine *v.* Redwine, 30 Geo. 780.

³ Newton *v.* Beckom, 33 Geo. 163.

⁴ Reynolds *v.* Wilson, 15 Ill. 394; Frazier *v.* Steenrod, 7 Iowa, 339.

⁵ Thompson *v.* Tolmie, 2 Pet. 157; Parker *v.* Kane, 22 How. 14; Beauregard *v.* New Orleans, 18 How. 497; Grignon's Lessee *v.* Astor, 2 How. 319; Morrow *v.* Weed, 4 Iowa, 77; Little *v.* Sinnott, 7 Iowa, 824; Long *v.* Burnett, 13 Iowa, 28.

⁶ Brown *v.* Redwyne, 16 Geo. 67.

⁷ Farmers' Bank of Maryland *v.* Clarke, 28 Md. 145.

the character of the notice given be of doubtful sufficiency the court should refuse confirmation.¹

§ 104. The officer making the sale may adjourn it, in the exercise of a reasonable discretion, with honest intent and in good faith, and with a view to a faithful performance of his duty (unless restricted by law).²

In the leading case cited, *Blossom v. The R. R. Company*, the court say that such is the rule in execution sales at law, “and no reason is perceived why the same rule may not be safely applied in judicial sales made under the decretal order of a court of chancery.”³ And in *Richards v. Holmes*, they hold that a sale, “regularly adjourned, so as to give notice to all persons present of the time and place to which it is adjourned, is, when made, in effect the sale, of which previous public notice was given.”⁴

That the person or officer who is authorized to sell at public auction, after proper notice of the time and place of sale, may regularly and legally adjourn the sale to a different time and a different place, when in his fairly exercised discretion it shall seem necessary, in order to obtain a fair auction price for the property, is too well settled to remain a matter of doubt, subject always, however, to the scrutiny and wise discretion of the court ordering the sale, as to the confirmation thereof.⁵

In the language of the United States Supreme Court, “If he has not this power, the elements, or many unexpected occurrences, may prevent an attendance of bidders and cause an inevitable sacrifice of the property. It is a power which every prudent owner would exercise in his own behalf, under the circumstances supposed, and which he may well be presumed to

¹ Trustees of Schools *v. Snell*, 19 Ill. 156; *Sowards v. Pritchett*, 37 Ill. 517, 524. “It is a cherished object of courts to give stability to judicial sales, and at the same time, as far as possible, protect and guard the rights of the owner. In all such cases the chancellor is necessarily vested with a large discretion, and he must so exercise it as will promote justice and protect the rights of parties. And in the exercise of that discretion this court will not interfere if it seems to have been soundly exercised.”

² *Blossom v. R. R. Co.*, 3 Wall. 209; *Collier v. Whipple*, 13 Wend. 229; *Brown v. Redwyne*, 16 Geo. 67; *Goddard v. Sawyer*, 9 Allen, 78.

³ 3 Wall. 209.

⁴ 18 How. 147; *Tinkom v. Purdy*, 5 Johns. 345; *Russell v. Richards*, 11 Maine, 371; *Warren v. Leland*, 9 Mass. 263; *Lantz v. Worthington*, 4 Penn. St. 153.

⁵ *Richards v. Holmes*, 18 How. 147.

intend to confer on another." And in the same case, "The courts of the several States have gone further in this direction than we find it necessary, though we do not intend to intimate any doubt of the correctness of their decisions. They have held that a public officer, upon whom a power of sale is conferred by law, may adjourn an advertised public sale to a different time and place, for the purpose of obtaining a better price for the property. *Tinkom v. Purdy*, 5 Johns. 345; *Russell v. Richards*, 11 Maine, 371; *Lantz v. Worthington*, 4 Barr, 153; *Warren v. Leland*, 9 Mass. 265."¹

The case of *Richards v. Holmes* arose on a sale by a trustee, under a deed of trust and not on a judicial decree. But the United States Supreme Court distinctly therein recognize the rule that officers selling under proceedings in court may adjourn the sale, and, therefore, the court assume that the trustee selected by the debtor himself may, by inference, do the same. But we would not be understood as claiming that the officer may, as a general rule, adjourn to a different place than the one named in the decree, if a place be named therein. Yet, even under such circumstances, sales have been allowed and confirmed by the courts.²

§ 105. The notice of a judicial sale, if no time be fixed by the decree, should name the hour of the day at which the sale is to be made, or certain hours between which it will take place, fixing the time in the ordinary business hours of the day; and the place of sale should be a convenient or public place, accessible to bidders.

When sale has been made under a notice which did not specify any hour or certain time of day for the sale, and the property was sold for a nominal sum, the sale was set aside.³

¹ *Richards v. Holmes*, 18 How. 144, 147.

² *Farmers' Bank v. Clarke*, 28 Md. 145.

³ *Trustees of Schools v. Snell*, 19 Ill. 156. In this case, SKINNER, Justice, said: "This was a motion to set aside a sale of land made on foreclosure of a mortgage. The Circuit Court set the sale aside. The decree directed the master to sell upon four weeks' notice of the time, terms and place of sale, published in a newspaper printed in the city of Pekin. The notice, published on the 4th of December, 1856, stated that the sale would be made on 'the 2d day of January next.' The proof showed that the property was sold at an enormous sacrifice. The notice as to the time of sale was insufficient. The 2d day of January included the astronomical period of a revolution of the earth upon its axis, twenty-four hours. 2 Blackstone's Com.

V. CONFIRMATION.

§ 106. Confirmation is the judicial sanction of the court. Until then the bargain is incomplete. When made, it relates back to the time of sale, and "supplies all defects,"¹ except those founded in defect of jurisdiction or in fraud. But a sale of lands under a decree of a court not having jurisdiction of the subject matter is void, and is not the less so for being confirmed.²

Until confirmed by the court, the sale confers no rights. Until then it is a sale only in a popular, and not in a judicial or legal sense. The chancellor has a broad discretion in the approval or disapproval of such sales. "The accepted bidder," (say the Supreme Court of Kentucky,) "acquires, by the mere acceptance of his bid, no independent right, as in the case of a purchaser under execution, to have his purchase completed;" but is merely a preferred proposer, until confirmation of the sale by the court, as agreed to by its "ministerial agent." In the exercise of this discretion a proper regard is had to the interest of the parties and the stability of judicial sales.³ By sanctioning the sale the

141, and notes; 1 Cowen's Treatise, 297. The sale, therefore, might, consistently with the notice, have been made immediately before midnight of that day, and if it was so made, it is voidable. The object of a public sale is, by fairness and competition, to evolve the full value of the property exposed and produce that value in the form of money. This can, as a general rule, only be done by making the sale at a convenient or public place, accessible to bidders, and during the ordinary business hours of the day. The notice should have stated the hour of sale, or that the sale would be made between certain named hours of the business portion of the day. Decree affirmed."

¹ Branch's *Principia*, 28; Cockey *v.* Cole, 28 Md. 276; Kœhler *v.* Ball, 2 Kan. 160, 172; Williamson *v.* Berry, 8 How. 546.

² Shriver's Lessee *v.* Lynn, 2 How. 43, 59, 60; 2 Bouvier, 415; Minnesota Co. *v.* St. Paul Co., 2 Wall. 609.

³ Busey *v.* Hardin, 2 B. Mon. 407; Taylor *v.* Gilpin, 3 Met. (Ky.) 544; Southern Bank *v.* Humphreys, 47 Ill. 227; Williamson *v.* Berry, 8 How. 547; Thorn *v.* Ingram, 25 Ark. 52; Mason *v.* Osgood, 64 N. C. 487; Moore *v.* Shultz, 18 Penn. St. 102; Hamilton's Estate, (Hays' Appeal,) 51 Penn. St. 59; Sowards *v.* Pritchett, 37 Ill. 517; Young *v.* Keogh, 11 Ill. 642; Ayers *v.* Baumgarten, 15 Ill. 444; Foreman *v.* Hunt, 3 Dana, 622; Campbell *v.* Johnston, 4 Dana, 186. In Hays' Appeal, *supra*, the court say: "Even the highest bidder, whose bid has been returned to the court as the best offered, has acquired no right which debars the heirs or the counsel from endeavoring to have his bid rejected and a resale ordered. It is their right to have as much obtained for the property as can be, and until a sale has been made and confirmed, they may seek for purchasers who are willing to give more than was offered at the public auction. They may ask the court to open the biddings, to order a new exposure of the

courts make it their own. There is a difference between such sales and ordinary auction sales and sales by private agreement. In the latter, says Daniel in his Chancery Practice, "the contract is complete when the agreement is signed; but a different rule prevails in sales before a master. In such cases the purchaser is not considered as entitled to the benefit of his contract till the master's report of the purchaser's bidding is absolutely confirmed." Such is the rule, whether the sale be by a master, commissioner, or other person or functionary authorized by the court to conduct the sale. The bargain is not ordinarily considered as complete until the sale is confirmed and the conveyance is made.¹

property at auction. His bid, though the highest, was but an offer to purchase, subject to the approval or disapproval of the court, and in approving sales made in partition it is the duty of the court to regard primarily the interest of the heirs."

¹ 2 Daniel Ch. 1274; Rawlings *v.* Bailey, 15 Ill. 178; Blossom *v.* R. R. Co., 3 Wall. 207; Childress *v.* Hurt, 2 Swan, 487; Williamson *v.* Berry, 8 How. 496; Valle *v.* Fleming, 19 Mo. 454; Webster *v.* Hill, 3 Sneed, 333; Henderson *v.* Herrod, 23 Miss. 434; Gowan *v.* Jones, 18 Miss. 164; Young *v.* Keogh, 11 Ill. 642; Wallace *v.* Hall, 19 Ala. 367; Robinson's Appeal, 62 Penn. St. 216; Hamilton's Estate, (Hays' Appeal,) 51 Penn. St. 59; Kœhler *v.* Ball, 2 Kan. 160, 172; Ayers *v.* Baumgarten, 15 Ill. 444; Leshey *v.* Gardner, 3 W. & Sergt. 314; Erb *v.* Erb, 9 W. & Sergt. 147; Webster *v.* Hill, 3 Sneed, 333; Dickerson *v.* Talbot, 14 B. Mon. 60; Austin *v.* Austin, 50 Maine, 74; Graham *v.* Hawkins, 38 Tex. 632; Brown *v.* Christie, 27 Tex. 77; Hirshfield *v.* Davis, 43 Tex. 155; Peters *v.* Caton, 6 Tex. 554; Berry *v.* Young, 15 Tex. 369; Burdett *v.* Silsbee, 15 Tex. 604; Yerby *v.* Hill, 16 Tex. 377; Dowling *v.* Duke, 20 Tex. 181; Wells *v.* Mills, 22 Tex. 302; Vandyke *v.* Johns, 1 Del. Ch. 93; Farrow *v.* Farrow, 1 Del. Ch. 457; Myers *v.* Raymond, 5 Fla. 517, 526; Redus *v.* Hayden, 43 Miss. 614; Mitchell *v.* Harris, 43 Miss. 314; Learned *v.* Matthews, 40 Miss. 210; Smith *v.* Denson, 10 Miss. 326; Hoel *v.* Coursery, 26 Miss. 511; Bland *v.* Muncaster, 24 Miss. 62; Monk *v.* Horne, 38 Miss. 100; Tooley *v.* Gridley, 11 Miss. 493; Sanders *v.* McDowell, 15 Miss. 206. (But lapse of time, if long enough, may operate as ratification, and obviate the necessity of confirmation; Learned *v.* Matthews, 40 Miss. 210;) Renfrow *v.* Pearce, 68 Ill. 125; Moffitt *v.* Moffitt, 69 Ill. 641; Mulvey *v.* Carpenter, 78 Ill. 580; Mulford *v.* Beveridge, 78 Ill. 455; Cummings *v.* Burleson, 78 Ill. 281, 284; Mathews *v.* Eddy, 4 Oregon, 225; Mills *v.* Ralston, 10 Kansas, 206; McVey *v.* McVey, 51 Mo. 406; Castleman *v.* Relfe, 50 Mo. 583. (But though omitted originally, yet confirmation may be subsequently decreed by the same court, where the basis for such subsequent action still remains in court.) McVey *v.* McVey, 51 Mo. 406; Wolf *v.* Wohlien, 32 Mo. 124; Strong *v.* Catton, 1 Wis. 471; Lupton *v.* Almy, 4 Wis. 242; Downer *v.* Cross, 2 Wis. 371. If the order of confirmation be made by a judge who is one of the purchasers, then both the sale and order of confirmation should be set aside. Whether his action be fair

§ 107. But, although there be no confirmation, if the deed be made and delivered, accompanied by possession of the premises, time may, and if sufficiently long will operate to confirm and ratify the sale, and will cure the title of the purchaser.¹

§ 108. The court is clothed with an unlimited discretion to confirm a judicial sale, or not, as may seem wise and just. Confirmation is final consent; and the court being the vendor, it may consent, or not, at its discretion;² but it can not change the terms of sale and then confirm. Such act would have no validity.³

§ 109. But confirmation, when made by the court, though subsequent to the day of sale, relates back to the date of the sale, if the date of sale is apparent of record or in the deed, and carries title as from that date.⁴ Confirmation cures all mere irregularities.⁵ Such relation; however, as well as the validity of the transaction is dependent upon the jurisdiction of the court; for if the court has not obtained jurisdiction, so as to enable it to decree, or having jurisdiction, and the sale be of lands not decreed to be sold, or described in the decree, then, in either event, confirmation will not give validity; the sale will be void.⁶

§ 110. The matter of confirmation rests so peculiarly upon the wise discretion of the court, in view of all the surrounding facts and circumstances to be exercised in the interest of fairness, prudence, and the rights of all concerned, that it is difficult

or unfair, the judge is incompetent, and the proceeding is fraudulent in law.—*Wilson v. Wilson*, 36 Ala. 655; *Heydenfelt v. Towns*, 27 Ala. 423, 429; *Satcher v. Satcher*, 41 Ala. 35.

¹ *Gowan v. Jones*, 18 Miss. 164; *Harteaux v. Eastman*, 6 Wis. 410; *Redus v. Hayden*, 43 Miss. 614; *Mitchel v. Harris*, 43 Miss. 314; *Conger v. Robinson*, 12 Miss. 221.

² *Ohio L. & T. Co. v. Goodin*, 10 Ohio St. 557; *Davis v. Stewart*, 4 Texas, 223; *Henderson v. Herrod*, 23 Miss. 434; *Glenn v. Wootten*, 3 Md. Ch. Decis. 514; *Andrews v. Scotton*, 2 Bland, 648; *Cunningham v. Schley*, 6 Gill, 207; *Harrison v. Harrison*, 1 Md. Ch. Decis. 331; *Thompson v. Cox*, 8 Jones, L 311; *Ashbee v. Cowell*, Busbee's Eq. (N. C.) 158.

³ *Ohio L. & T. Co. v. Goodin*, 10 Ohio St. 557; *Benz v. Hines*, 3 Kansas, 390

⁴ *Evans v. Spurgin*, 6 Gratt. 107; *Wagner v. Cohen*, 6 Gill. 97.

⁵ *Harrison v. Harrison*, 1 Md. Ch. Decis. 331.

⁶ *Shriver's Lessee v. Lynn*, 2 How. 43; *Townsend v. Tallant*, 33 Cal. 45; *Bethel v. Bethel*, 6 Bush. 65.

to come at any absolute legal rule on the subject, other than that of a sound legal discretion.¹ But any mistake or misunderstanding between the persons conducting the sale and intended bidders or parties in interest, and any accident, fraud, or other circumstance by which interests are prejudiced without the fault of the injured party or parties, or by reason whereof property is sold at an under price considerably disproportioned to its real value, will be deemed sufficient cause for refusing confirmation and for ordering a resale.² And so, generally, whatever, and even less than is sufficient to set a sale aside after its consummation will, of course, upon the same principle (if known,) cause confirmation to be denied.

§ 111. In California, where, it seems, that personal jurisdiction of those in interest is required in procuring decrees in probate for sale of a decedent's land by the administrator, it is held that without such jurisdiction the sale is void,³ and will be so held in a collateral proceeding. So likewise is void any order of confirmation of such a sale, the order of sale itself being void.⁴

§ 112. In an application of the administrator to sell lands of an estate wherein he is also guardian of the heir, if personal notice to the heir is necessary by law, then the relations of administrator and guardian are antagonistic, and he can not perfect a legal sale in acting for both.⁵

§ 113. The order of confirmation is in the nature of a final order, judgment, or decree, and may be appealed from.⁶ If

¹ *Henderson v. Herrod*, 23 Miss. 434; *Sowards v. Pritchett*, 37 Ill. 517.

² *Cohen v. Wagner*, 6 Gill, 236; *Latrobe v. Herbert*, 3 Md. Ch. Decis. 375.

³ *Townsend v. Tallant*, 33 Cal. 45.

⁴ *Ibid.* By the court: "Again, the defendants insist that the sale having been confirmed by the probate court, can not be collaterally attacked in this action, but that as against the plaintiff the confirmation is conclusive that the court had jurisdiction of both subject matter and parties. But if the order of sale was *coram non judice*, then the 'sale' was no sale, and it could not be made valid and binding by any number of so-called confirmations. The sale being void, there was no subject matter upon which the order of confirmation could act. If the court had no jurisdiction to order the sale it had none to confirm it. Where there is no power to render a judgment, or to make an order, there can be none to confirm or execute it; or none at least without the help of legislation."

⁵ *Ibid.*; *Gregory v. Taber*, 19 Cal. 410; *Haynes v. Meeks*, 20 Cal. 317.

⁶ *Köhler v. Ball*, 2 Kansas, 160.

there is jurisdiction, and the law allows no appeal, then it is final to the like extent as other judgments and decisions, from which no appeal is allowed, are final. It can not be assailed in a collateral proceeding. It is a judicial decision that the sale is properly made so far as facts appear on the officer's return.

§ 114. In some of the States, as in Kansas, the legal and the equitable jurisdictions and practice are so mingled into a sort of hybrid system, as to partake alike sometimes of each, and seldom exclusively of either. Thus, in that State, even in cases at law, instead of an ordinary writ of execution, an order of sale goes to the officer, partly under the control of the court and partly directed by statute, and the sale is to be reported for confirmation as well on legal as on equitable findings; but when so reported, instead of being confirmable at the discretion of the court, the court is by statute required to confirm them, "if made in conformity to the provisions" of the statute. This renders the sale partly judicial and partly ministerial,¹ and is a finding that the statute is complied with.

§ 115. So in Nebraska, confirmation of judicial sales is the practice, and after confirmation can not be questioned collaterally, if there is jurisdiction. Confirmation is conclusive.² The same whether the order of sale be carried out and the sale made upon the decree itself, or be enforced by special execution.³ And sales in attachment proceedings are in the nature of judicial sales, though made on execution. For, though made by the officer of the law, yet they are made and carried out under the guidance and superintendence of the court. The court order the sale of the property attached, and the sale is not complete till confirmed by the court.⁴ By the purchase, the purchaser becomes a party to the cause, and is in court, and may be forced to comply with his bid. He is also entitled to an order, when he has so complied, to the officer to convey, if no satisfactory objection be shown thereto.⁵

§ 116. In judicial sales, only those made party to the proceedings, if *adversary* in their nature, are affected thereby.⁶

¹ *Koehler v. Ball*, 2 Kansas, 160, 171, 172; *Chick v. Willets*, 2 Kansas, 384, 390.

² *Phillips v. Dawley*, 1 Neb. 320; *Cowell v. Johnson*, 2 Neb. 146.

³ *Phillips v. Dawley*, 1 Ncb. 320; *Cowell v. Johnson*, 2 Neb. 146.

⁴ *Phillips v. Dawley*, 1 Neb. 320.

⁵ *Ibid.*

⁶ *Miller v. Finn*, 1 Neb. 254.

§ 117. In foreclosure of mortgages against real property, if the land be in parcels, the sales are to be made in parcels, and the parcels must be separately appraised. If not so, the sale will be set aside.¹ And though the sale be confirmed, yet if deficient in these particulars, the order of confirmation may be reversed and the sale annulled.²

§ 118. The doctrine of caveat emptor applies to execution sales proper in Nebraska with all its force.³

§ 119. The reversal of the judgment does not affect the title to the property purchased when it has passed into the hands of a *bona fide* purchaser from the one purchasing at the execution sale.⁴ And a *bona fide* execution purchaser is protected against a mortgage unrecorded at the time of execution sale, although it become recorded before expiration of the time of redemption and obtaining the sheriff's deed. The deed relates back to the sale.⁵

§ 120. And so likewise in Oregon, the practice is to confirm both execution and judicial sales; and when so confirmed, they are no longer open to collateral impeachments, for irregularity or other cause, short of want of jurisdiction.⁶

§ 121. And, although when the sale is by confirmation completed, it will not be set aside for mere inadequacy of price, yet if the report of the sale shows such inadequacy, then confirmation will, for that reason, be refused.⁷

§ 122. If confirmation—or as termed in some of the States, ratification—be made through mistake, or be obtained by fraud, it will be set aside if timely application be made therefor.⁸

§ 123. Confirmation should not be made, if the notice of sale has not conformed to that required by the decree, and the amount

¹ Laughlin *v.* Schuyler, 1 Neb. 409.

² Ibid. And so sales will be set aside in Nebraska for fraud where the buyer is deceived into the belief that the proceeds are to be differently applied than what is in reality the case, and to the prejudice of such purchaser. Paulett *v.* Peabody, 3 Neb. 196.

³ Miller *v.* Finn, 1 Neb. 254.

⁴ McAusland *v.* Pundt, 1 Neb. 211.

⁵ Bennett *v.* Fooks & Moffit, 1 Neb. 465.

⁶ Matthews *v.* Eddy, 4 Oregon, 225.

⁷ Hirshfield *v.* Davis, 48 Tex. 155.

⁸ Montgomery *v.* Williamson, 37 Md. 421. (In Maryland, the terms *ratification* and *confirmation*, are sometimes used to convey the same import.) Krone *v.* Linville, 31 Md. 138.

bid be less than the probable real value of the property. In such case a resale should be ordered.¹

§ 124. And when the order of sale is such as requires different terms than those prescribed by the statute, as where the statute prescribes a given time, as the least term of the credit to be given, and the credit be of a less term, such deviation from the law will require the sale to be set aside as prejudicial to the owner of the land.²

§ 125. And though the commissioner appointed to sell, be not expressly ordered to convey as well as sell the land, yet if he do so, and make full report to the court, and the sale and proceedings be by the court confirmed, such decree of confirmation cures all defects that are remediable by the court under the circumstances, and the sale and conveyance will be valid. For while the act of confirmation may not be allowed to cure deficiencies of a jurisdictional nature, it will, nevertheless, cure mere irregularities.³

§ 126. But a sale under a decree against an executor of the deceased debtor, the heirs not being made parties, carries *no title* in Virginia, even after confirmation.⁴

§ 127. But although, as we have seen, the legislative branch of government may rightfully pass curative laws confirming and validating irregular judicial sales, and the acts of public officers who have honestly executed, or have imperfectly executed their powers, in cases of sales fairly made, and acts attempted to be performed, without guile in the supposed proper discharge of official duties,⁵ yet it is not within the constitutional province of a legislature to confirm and make valid a fraudulent judicial sale, or other fraudulent sale, so as to preclude the judicial department in the ordinary course of judicial proceedings from invalidating and vacating the same, and from affording proper relief therefrom. The exercise of such powers by the legislative department, is *extra-legislative* and void.⁶

¹ Williams *v.* Woodruff, 1 Duvall, 257.

² Dunn *v.* Salter, 1 Duvall, 342.

³ Evans *v.* Spurgin, 6 Gratt. 107.

⁴ Hudgin *v.* Hudgin's Excr., 6 Gratt. 320.

⁵ White Mountain R. R. Co. *v.* White Mountain (N. Hamp.) R. R. Co., 50 N. Hamp. 50.

⁶ Ibid.

VI. WHEN THE TITLE PASSES.

§ 128. The contract of sale is only executed so as to pass the title by payment of the money, and the execution and delivery of the deed, duly approved or confirmed by the court, as the practice may be.¹

In the mean time, and until then, the title in administration, executors and guardian sales remains in the ward or in the heirs, as the case may be, and in other cases it remains until then, in the former owner.²

§ 129. But if the deed be executed and delivered, and the consideration be paid, and the proceedings and sale are correct in all things other than report of the selling and order of confirmation, yet the title, by long possession of the premises, without question of its validity, will ripen into a valid one by lapse of time, as is herein before stated.³

VII. WHEN NOT AIDED IN EQUITY.

§ 130. A purchaser of real estate at a guardian's sale, where the sale has not been reported, confirmed, or approved, as required by statute, will not be aided in equity by injunction against an action at law for the premises, nor by a decree confirming the sale, or quieting title, although such purchaser has paid the purchase money.⁴

§ 131. If an administration sale of lands be void at law, equity can not ordinarily interfere to set up or maintain it.⁵

¹ *Leshey v. Gardner*, 3 W. & S. 314; *Williamson v. Berry*, 8 How. 547; *Moore v. Shultz*, 13 Penn. St. 102; *Busey v. Hardin*, 2 B. Mon. 407; *Thorn v. Ingram*, 25 Ark. 52; *Sowards v. Pritchett*, 87 Ill. 517; *Campbell v. Johnston*, 4 Dana, 186; *Forman v. Hunt*, 3 Dana, 623.

² *Erb v. Erb*, 9 W. & S. 147.

³ *Gowan v. Jones*, 18 Miss. 164.

⁴ *Young v. Dowling*, 15 Ill. 481; *Bright v. Boyd*, 1 Story, 478, 487; *Dickey v. Beatty*, 14 Ohio St. 389. In *Bright v. Boyd*, STORY, Justice, says: "Now, it is a well settled doctrine that although courts of equity may relieve against the defective execution of a power created by a party, yet they can not relieve against the defective execution of a power created by law, or dispense with any of the formalities required thereby for its due execution, for otherwise the whole policy of the legislative enactments might be overturned. There may be exceptions to this rule, but if there be the present case does not present any circumstances which ought to take it out of the general rule."

⁵ *Lieby v. Parks*, 4 Ohio, 469, 493; *Young v. Dowling*, 15 Ill. 481; *Bright v. Boyd*, 1 Story, 478.

Nor has the purchaser a lien on the land on failure of title, which chancery can enforce against the heirs for the purchase money.¹

VIII. NOT AFFECTED BY REVERSAL OF THE DECREE.

§ 132. The title acquired at a decretal sale of lands made by a court in the exercise of competent jurisdiction, is not rendered invalid by the reversal of the decree for mere irregularity or error.² This, too, although the purchaser was a party to the suit in which the decree was made.³ Nor if notice be given to the purchaser at the time of the sale and before he purchased that an effort would be made to reverse the decree.⁴

In the case above cited from the 1st of Wallace, the Supreme Court of the United States lay down the rule to be, "that although the judgment or decree may be reversed, yet all rights acquired at a judicial sale while the decree or judgment were in full force, and which they authorized, will be protected. It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order on the faith of which he purchased was made, and authorized the sale." With the errors of the court he has no concern.⁵ This doctrine applies, however, to sales where present power to make them is clearly given to the person selling by the decree or order of the court, and not to sales made on interlocutory orders not yet ripened into full authority to sell, and which contemplate and require further action of the court in reference thereto before the authority to sell can be exercised. Sales under such interlocutory order before further action by the court are invalid and will not be protected from the effect of reversal even by a curative entry made *nunc pro tunc*.⁶

¹ Lieby *v.* Parks, 4 Ohio, 469, 493.

² Ward *v.* Hollins, 14 Md. 158; Irwin *v.* Jeffers, 3 Ohio St. 389; Gossom *v.* Donaldson, 18 B. Mon. 230; Gray *v.* Brignardello, 1 Wall. 627, 634; Clark *v.* Bell, 4 Dana, 20; Fergus *v.* Woodworth, 44 Ill. 374; Goudy *v.* Hall, 36 Ill. 319; McLagan *v.* Brown, 11 Ill. 637; Iverson *v.* Loberg, 26 Ill. 179; Wampler *v.* Wolfinger, 18 Md. 337; Chase *v.* McDonald, 7 Har. & J. 199.

³ Gossom *v.* Donaldson, 18 B. Mon. 230.

⁴ Irwin *v.* Jeffers, 3 Ohio St. 389.

⁵ Gray *v.* Brignardello, 1 Wall. 634; Vorhees *v.* Bank of the United States, 10 Pet. 449; Blane *v.* Carter, 4 Cranch, 328; Tayloe *v.* Thompson, 5 Pet. 370; Wright *v.* Hollingsworth, 1 Pet. 169; Elliott *v.* Peirsol, 1 Pet. 340.

⁶ Gray *v.* Brignardello, 1 Wall. 634, 636; Southern Bank of St. Louis *v.* Humphreys, 47 Ill. 227.

§ 133. But where one only of several creditors, parties to the proceedings and entitled to the proceeds of sale, becomes the purchaser, applying only his own portion of the purchase money on his purchase, and paying the residue into court, and the same is distributed among the other claimants by a decree of distribution and paid over to them, some of whom are insolvent, it is held, in Ohio, that such purchaser, on a bill of review, is entitled to the protection of the statute of that State of 1841, which provides, "that if any judgment or judgments in satisfaction of which any lands or tenements belonging to the party hath or shall be sold, shall, at any time thereafter be reversed, such reversal shall not affect or defeat the title of the purchaser or purchasers; but in such case restitution shall be made of the moneys by the judgment creditor, for which such lands or tenements were sold, with lawful interest from the day of sale." And in the same case an improper distribution of proceeds was afterward corrected on bill of review.¹

§ 134. In the case of *McBride v. Longworth*,² the previous case of *Hubbel v. Broadwell*³ was adverted to and approved, as not in conflict with the decision in *McBride v. Longworth*, as in the Hubbell case, the purchaser was the sole creditor; purchased in discharge of his own mortgage decree; received the entire proceeds, and was still the holder of the premises so purchased by him, and "no new rights had intervened." The court there held, that such sole purchaser was to be regarded as a party merely and not as a *bona fide* purchaser; and that on reversal of the decree of sale the mortgagor had a right to redeem. That as "there were no other parties in interest but the mortgagor and mortgagee," and that "between them full justice could be done" after such reversal.

Such, too, is the rule in Virginia. A purchaser there at judicial sale, who is a party to the proceeding and in interest, is not held to be a *bona fide* purchaser to the extent that will protect his purchase in case of a reversal of the decree by authority of which it is made. His condition, in that respect, is unlike that of a stranger to the proceedings who becomes a purchaser under the decree. Such stranger is protected, but the sale fails, on reversal

¹ *McBride v. Longworth*, 14 Ohio St. 349, 351, 352.

² *Ibid.*

³ 8 Ohio, 120.

of the decree, as to the purchaser who is a party in interest or to the proceedings.¹

IX. How Affected by the Statute of Frauds.

§ 135. The prevailing rule is, that after confirmation, judicial sales are not within the statute of frauds. Lord HARDWICKE seems to have first asserted this principle in the case of the *Attorney General v. Day*.² His Lordship, in that case, lays down the rule that judicial sales, unlike ministerial sales of a sheriff on execution, are not within the statute of frauds, and, therefore, his Lordship declared that after the master's report and confirmation, he did not doubt the propriety of carrying into execution a purchase made by oral bid, although the purchaser had subscribed to no agreement. Judge STORY assented to the same principle in *Smith v. Arnold*, but did not consider the sale involved in that case a judicial sale, for the reason, as he states, that in Rhode Island such sales are not by law required to be reported to the court for confirmation.³

§ 136. In New York it is held that if a judicial sale is within the statute at all, the report of the master or officer, or the memorandum of the auctioneer employed by him is sufficient to take it out.⁴ In Missouri the ruling is substantially the same as to the effect of the master's report.⁵ In Alabama the sale is held to be out of the statute by confirmation, not before.⁶ These rulings, though some of them go further, sustain the principle laid down by Lord HARDWICKE, which is that after confirmation the sale is out of the statute.

In Pennsylvania and California, the authorities go to a still greater length, and the rule is, that judicial sales are not within the statute of frauds at all.⁷

¹ Buchanan *v.* Clark, 10 Gratt. 164.

² 1 Ves. Sr. 218; Brown, Statute of Frauds, Secs. 264, 265; King *v.* Gunnison, 4 Penn. St. 171.

³ Smith *v.* Arnold, 5 Mason, 414, 420, 421.

⁴ Hegeman *v.* Johnson, 35 Barb. 200. This case was one of sale on mortgage foreclosure. National Fire Ins. Co. *v.* Loomis, 11 Paige, 431.

⁵ Stewart *v.* Garvin, 31 Mo. 36.

⁶ Hutton *v.* Williams, 35 Ala. 503.

⁷ Fulton *v.* Moore, 25 Penn. St. 468; Halleck *v.* Guy, 9 Cal. 181; King *v.* Gunnison, 4 Penn. St. 171.

§ 137. In Illinois the ruling is, that administrator's sales are within the statute, and that even judicial sales by a master are not binding "until approved by the court," which, of course, carries the inference that after approval or confirmation those made by a master are no longer within the statute.¹ In fact before approval or confirmation there is no sale where these are required.

X. WHEN VALID BY LAPSE OF TIME.

§ 138. There is a defense, founded alike in benevolence, equity, and sound policy. It is lapse of time. Time, which destroys all things else, serves but to render one's landed possessions and titles more sacred and more secure. Time or accident destroy records and muniments of title, yet time itself, when sufficiently long, repairs the loss. Errors, irregularities, and judicial insufficiencies may intervene after a series of years to avoid a title and destroy a right; but time supplies the presumption that in the inception of the possession the attributes of title were all right, a presumption growing out of long possession and out of the negligence of the adverse claimant in prosecuting his claim. Benevolence and good conscience alike forbid the disturbance of possessions and firesides by demands, which if earlier presented, might possibly have been explained away. Equity will discountenance them when time has carried away those who are presumed to have had knowledge of the transactions and rights thus sought to be questioned, and will refuse such claimants equitable aid. A like refusal is also based on what is called "analogу" to limitations of statutes at law, where a less time has run than is ordinarily deemed curative in itself.² So, that in titles founded on judicial sales, if there be defects and irregularities, yet by lapse of time the presumption arises that in the inception of the title

¹ *Bozza v. Rowe*, 30 Ill. 198.

² Story's Eq. Jur. Secs. 64*a*, 529, 1520 et seq.; *Slicer v. Bank of Pittsburgh*, 16 How. 571; *Beauregard v. New Orleans*, 18 How. 502; *Newson v. Wells*, 5 McLean, 22; *Shaefer v. Gates*, 2 B. Mon. 457; *Gray v. Gardner*, 3 Mass. 398; *Leverett v. Armstrong*, 15 Mass. 27; *Scott v. Freeland*, 15 Miss. 409; *Bostwick v. Atl. Ins.*, 3 N. Y. 53; *Laughman v. Thompson*, 14 Miss. 259; *Moore v. Greene*, 19 How. 69; *Watt v. Scott*, 3 Watts. 79; *Evans v. Spurgin*, 11 Gratt. 615; *Harteaux v. Eastman*, 6 Wis. 410; *Redus v. Hayden*, 43 Miss. 614; *Mitchel v. Harris*, 43 Miss. 314; *Conger v. Robinson*, 4 S. & M. 221.

the deficiencies were all supplied, and that their evidences have passed away.

§ 139. But no length of time will within itself raise a presumption in contradiction to an express showing of the record. Thus, where the record and proceedings show affirmatively that a guardian *ad litem* did not, as such, or otherwise, appear in an action, and was not in any manner brought into court in the course of the proceedings, and the proceedings are fatally defective by means of such showing, mere lapse of time will not cure the defect, or raise a presumption contradictory to the record in order to uphold a sale or to supply the deficiency.¹ The affirmative showings of the record are to be received as absolute verity. Presumptions will supply such irregularities only as do not involve the question of jurisdiction, and whereof the record is silent.

XI. How Affected By Statute of Limitations.

§ 140. The special statute of limitations limiting the time to five years, or other term, in which the validity of sales in probate made at the instance of guardians and administrators, may be questioned, is not construed to apply to such sales made under decrees or orders that are void for the want of jurisdiction of the court; or in cases where jurisdiction had not attached; nor to sales made as if by a guardian, by one assuming to be, but in reality not such. If the order be void, or if the sale be made by one having no authority whatever, nor semblance thereof, the statute will not apply. In all such cases the heir at law will not be estopped by the limitation of time named in the statute from asserting his title.² Nor will the statute apply to sales made before its enactment.³

§ 141. But the defendant, in an action for real estate, who makes title under an administrator's sale in probate and conveyance, and having had possession for more than five years, the

¹ Shaefer *v.* Gates, 2 B. Mon. 457, 458.

² Pursley *v.* Hayes, 22 Iowa, 11; Holmes *v.* Beal, 9 Cush. 223; Chadbourne *v.* Radclift, 30 Maine, 354; Boyles *v.* Boyles, 37 Iowa, 592. In the last case here cited, the case of Good *v.* Norly, 28 Iowa, 188, decided by a divided court is referred, concurred in, and followed by a united court, the two cases being similar.

³ Cooper *v.* Sunderland, 3 Iowa, 114.

time limited in which to question such sales, and who pleads and relies on such limitation, will not be required in such action to first show a *prima facie* valid sale before he can take the benefit of the statute.¹ To require the defendant to first establish a valid sale before he can have the benefit of the limitation would effectually do away with the statute; for if the sale be shown to be valid, such showing is a full defense, and the statute is useless.

§ 142. But ordinarily a defendant thus defending must show a sale in fact and a deed thereon, and that the same was confirmed by the court, so as to amount to color of title under which to claim the protection of the statute of limitation.²

§ 143. The ordinary statutes of limitations of actions for recovery of real property, or of equity proceedings to avoid fraudulent real estate transactions, do not apply to or bar applications to set aside sales made in probate, on the ground of the purchaser being concerned in selling. The principle on which the courts avoid these last named transactions is, that however free, in point of fact, they be from evil or fraudulent intent, they are prohibited, by the policy of the law, as poisonous to the fairness of judicial and of trust or fiduciary proceedings.³

§ 144. Nor do such statutes of limitation of actions for the recovery of real property apply to proceedings to set aside judicial sales, where the ground of avoiding the sale is a purchase by or for the benefit of those concerned in selling; for such proceeding is not an action for the recovery of real property within the meaning of the statute.⁴

§ 145. Nor does the statute limiting the time for uncovering fraudulent real estate transactions apply to such cases, for the real ground of the application to set aside the sale is the policy of the law, which forbids the purchase by those who sell, or are concerned therein, as a practice tending to the encouragement of abuses of trusts and confidences of fiduciary relations, and to poison the purity of judicial and of trust transactions.⁵

§ 146. And the statute of Indiana limiting suits to test the

¹ Holmes *v.* Beal, 9 Cush. 223; Vancleave *v.* Milliken, 13 Ind. 105; Spencer *v.* Sheehan, 19 Minn. 338; Montour *v.* Purdy, 11 Minn. 384.

² Rawlings *v.* Bailey, 15 Ill. 178; Vancleave *v.* Milliken, 13 Ind. 105.

³ Potter *v.* Smith, 36 Ind. 231; Story's Eq. Jur. Sec. 322.

⁴ Potter *v.* Smith, 36 Ind. 231; Story's Eq. Sec. 322.

⁵ Potter *v.* Smith, 36 Ind. 231; Story's Eq. Sec. 1521.

validity of sheriff's sales of real property upon execution to ten years is not to be construed to vitalize such sales after that limit of time as were of no validity within themselves, or were in the meantime declared void by judicial determination.¹

§ 147. Nor does said statute apply to actions by the grantee under the sheriff, though brought after the end of the ten years, against the tenant in possession, so as to prevent questioning such sale. The act is intended merely to *defend and quiet* the purchaser in his possession and title to the premises after the period of ten years has elapsed, and not as a means of setting up title in a plaintiff. It is merely an act of repose.²

XII. HOW ENFORCED AGAINST THE PURCHASER.

§ 148. By the purchase, the purchaser at a judicial sale becomes a party to the proceedings in which the sale is made.³ Now, whoever makes himself a party to the proceedings of a court of general equity jurisdiction, and undertakes to do a particular thing under its decretal orders, may be compelled to perform what he has undertaken.⁴ The proper tribunal to compel it is the same court, and by motion in the same cause in which the undertaking occurred.⁵ This rule applies to purchasers at

¹ Gray *v.* Stiver, 24 Ind. 174.

² Gray *v.* Stiver, 24 Ind. 174; Hutchens *v.* Lasley, 11 Ind. 456.

³ Cazet *v.* Hubbell, 36 N. Y. R. 677; Requa *v.* Rea, 2 Paige, 339; Deaderick *v.* Watkins, 8 Humph. 520; Atkinson *v.* Richardson, 14 Wis. 157; Same *v.* Same, 18 Wis. 244; Gordon *v.* Saunders, 2 McCord's Eq. 151; Stimson *v.* Mead, 2 R. I. 541; Cowell *v.* Lippett, 2 R. I. 92; Coffey *v.* Coffey, 16 Ill. 141; Clarkson *v.* Read, 15 Gratt. 288; Cazet *v.* Hubbell, 36 N. Y. 677; Brasher *v.* Cortlandt, 2 John. Ch. 505; Casamajor *v.* Strode, 1 Sim. & St. 381; Lansdown *v.* Elderton, 14 Ves. 512; Covington & Lexington R. R. Co. *v.* Bowler's Heirs, 9 Bush. 468.

⁴ Gross *v.* Pearcy, 2 Pat. & H. 483; Planter's Bk. *v.* Fowlkes, 4 Snead, 461; Blackmore *v.* Barker, 2 Swan, 340; Stimson *v.* Mead, 2 R. I. 541; Cazet *v.* Hubbell, 36 N. Y. 677; Hill *v.* Hill, 58 Ill. 239; Vance's Admr. *v.* Foster, 9 Bush. 389.

⁵ Wood *v.* Mann, 3 Sumn. 318, 326; Requa *v.* Rea, 2 Paige, 339; Brasher *v.* Cortlandt, 2 John. Ch. 505; Cazet *v.* Hubbell, 36 N. Y. 677; Casamajor *v.* Strode, 1 Sim. & St. 381; Lansdown *v.* Elderton, 14 Ves. 512. (And lapse of time, though of many years, is no bar to the motion, where the purchaser has the benefit of his purchase and is in possession, and still retains a portion of the purchase money. Cazet *v.* Hubbell, 36 N. Y. 677.)

judicial sales in courts of chancery, and the proper method of compulsion is by attachment.¹

§ 149. Nor does it matter that there is a right, on default of payment, to resell the lands or bring suit; for the right is optional, not with the purchaser, but with the court or party selling.² The very point was decided by Lord ELDON in *Seton v. Slade*,³ in which case the court said: "If you make out that the seller would have been at liberty to resell, that does not make out that he lets the other off."

§ 150. But such purchaser at a judicial sale may not be thus compelled to complete the sale if the title be defective, nor to pay the consideration money until the defect, if there be one, is obviated; for although the rule *caveat emptor* applies after the sale is closed by payment of the purchase money and delivery of the deed, if there be no fraud; yet the buyer, if he discover the defect beforehand, will not be compelled to complete the sale.⁴

And therefore if a rule be made against him with a view to enforcing compliance with his bid, he may, on appearance thereto, have an order of reference to inquire into and report the state of the title to the property and if the title prove to be doubtful and incurably defective, he will not be coerced into completion of the purchase.⁵

§ 151. But it is no defense to the rule, or excuse for not perfecting the sale, that the property is injured by fire after closing the biddings, for a loss of the property by fire, between the close of the biddings and acceptance of the bid, and the confirmation of the sale will not excuse the purchaser from a compliance. Such loss falls upon him where no other objection can be made to the purchase.⁶

§ 152. And though the judicial sale of lands of a minor be irregularly made, yet if it be for the interest of the minor that the sale shall stand, the court will enforce the same and complete the title, if practicable, the same at equity as well as between

¹ *Wood v. Mann*, 3 Sumn. 318, 326; *Landsdown v. Elderton*, 14 Ves. 512. In the matter of *Yates*, 6 Jones Eq. 212. *Brasher v. Cortlandt*, 2 Johns. Ch. 505; *Vance's Admr. v. Foster*, 9 Bush. 389.

² *Wood v. Mann*, 3 Sumn. 318; *Cazet v. Hubbell*, 36 N. Y. 677.

³ 7 Ves. 265; *Wood v. Mann*, 3 Sumn. 331.

⁴ *Ormsby v. Terry*, 6 Bush. 553.

⁵ *Graham v. Bleakie*, 2 Daly, 55.

⁶ *Vance's Admr. v. Foster*, 9 Bush. 389.

individuals on their personal contracts, provided it can be perfected or done within a reasonable time. Mere irregularities will be swept out of the way by the court by such curative decrees or orders as equity shall require.¹

§ 153. And where the sale has been for part cash, and partly on credit, (or even all upon credit,) and there is a failure on the part of the purchaser to make good the credit payments, the purchaser having placed himself in court by his act of purchasing, and the sale having been confirmed, the court will proceed against him in a summary manner by a rule to show cause why the land shall not be sold to satisfy the remaining balance; and on failure to show sufficient cause to the contrary, a decree will be made to sell the land so purchased by him, or a sufficiency thereof, to pay such balance of unpaid purchase money and costs. The party being in court, and the court itself, as is the case in such sales, being party to the sale, will not be turned over to the circuitous remedy of an action to recover the unpaid purchase money.²

§ 154. So, likewise, if the sale under the decree be a private one so allowed by the decree, and the bids be receivable by the court, in writing, as is sometimes the case, if the court accepts a bid so put in and affirms the sale, it will thereafter treat the bidder as in court and will coerce his compliance with his bid.³

§ 155. Such coercion may be by writ of attachment against the person of the refractory purchaser, or by order of resale, if the title has not passed.⁴

§ 156. But it is said that in case of resale the original purchaser should first have a day fixed in the decree of resale, by which he may discharge the purchase money and thus redeem from the decree of resale.⁵

§ 157. Or if the buyer fails to pay, the commissioner selling may petition the court, in the original cause, if a court of gen-

¹ Daniel *v.* Leitch, 13 Gratt. 195.

² Clarkson *v.* Read, 15 Gratt. 288. By the purchase, as we have seen, *supra*, the purchaser submits himself to the jurisdiction of the court in all things relative to the sale; and such, too, is the English doctrine on the subject. Casamajor *v.* Strode, 1 Sim. & Stuart, 381. Or, if in possession, he may be compelled by an order to deliver up the possession of the premises. Ib.

³ Cooper *v.* Hepburn, 15 Gratt. 551.

⁴ Gross *v.* Pearcey, 2 Pat. & H. 483, 489.

⁵ Ibid.

eral equity powers, without notice to the buyer, for by purchase he is party in court and have an order of resale.¹ If the resale raises an excess over the first sale and costs, the excess goes to the defaulting purchaser, and if a deficiency, he is held liable therefor, for he is still a party in court and payment thereof may be enforced.²

§ 158. In case of a judicial sale for purchase money to be paid in the future, with decree that execution go for the purchase money, in case the same be not paid by a given day, the clerk can not issue execution without an order of court authorizing him to do so. He can not decide the fact as to whether there is default in payment or not. Neither can the court, without evidence to satisfy the judicial mind.³ If issued without authority of the court, it will, on motion to the court, be quashed or set aside.⁴

§ 159. To resell and charge the bidder who has declined to perform, with any deficiency arising on such resale, the master or person selling is to report the sale and refusal to the court, and, after confirmation, a notice of motion goes against the delinquent purchaser to pay in the purchase money in a given time, and that in default thereof, an order will be made to resell, at his risk, unless he shows cause to the contrary. If no cause be then shown, the order is made to resell to the highest bidder at the delinquent purchaser's risk and expense.⁵ In default of such proceedings against the purchaser, a bill in chancery does not lie to charge him with the deficiency.⁶

§ 160. The rule, in Georgia, is that the purchaser of lands at administrator's sale declining to complete the purchase, is liable, if such were made known at time of sale, for the difference, if less, which the property brings on a resale thereof. The measure of damages is, that sum which will make good the amount of the first purchase.⁷

¹ Stephens *v.* Magruder, 31 Md. 168; Barnes *v.* Morris, 4 Ired Eq. 22; Single^tary *v.* Whitaker, Phil. Eq. (N. C.) 77.

² Stephens *v.* Magruder, 31 Md. 168.

³ Shackleford *v.* Apperson, 6 Gratt. 451.

⁴ Ibid.

⁵ Hill *v.* Hill, 58 Ill. 239; 2 Smith's Ch. Prac. 204, 205; Gross *v.* Pearcy, 2 Pat & H. 483; Clarkson *v.* Read, 15 Gratt. 288.

⁶ Hill *v.* Hill, 58 Ill. 239.

⁷ Daniel *v.* Jackson, 53 Geo. 87; Alexander *v.* Herring, 54 Geo. 200.

§ 161. The remedy, in case of administrator's sale, is by action. The probate court can not enforce payment of the difference by summary process.

XIII. HOW CARRIED INTO EFFECT IN FAVOR OF PURCHASER.

§ 162. In judicial sales, by courts of ordinary general chancery jurisdiction, the better course is for the decree or order of sale to include also an order to put the purchaser into possession to save a resort to an action at law for that purpose. But whether there be such order inserted in the decree or not, the court has full power to enforce its sale by putting the purchaser into possession of the premises against the possession of a party to the suit, or any one holding under such party, who came into the possession during the pendency of the suit and refuses to render up the premises to the purchaser.¹

§ 163. The mode of proceeding is, first by a judicial order to the defendant in possession to deliver up the premises to the purchaser, according to the intent of the decree. Or when the decree of sale includes an order for possession, then a formal writ of possession or decretal order for possession is proper. If ineffectual, the next step is an injunction, and then a writ of assistance.²

§ 164. In *Lannay's Lessee v. Wilson*, 30 Md. 536, the court say, ALVEY, J.: "A sale by a trustee appointed by a decree for that purpose, is a judicial sale, and binds and concludes all the parties to the cause, who may have right or claim; and the court passing the decree has ample power to make its jurisdiction effectual, by putting the purchaser into possession of the premises sold by its authority."

§ 165. And by the ruling in the same case, this too, although the purchaser obtains no deed, and having been so put into the possession, he is not a wrong doer, and he is not in wrongfully,

¹ *Kershaw v. Thompson*, 4 Johns. Ch. 609; *Gowan v. Sumwalt*, 1 Gill and J. 511; *Frelinghuysen v. Colden*, 4 Paige, 204; *Van Hook v. Throckmorton*, 8 Paige, 33; *McGown v. Wilkins*, 1 Paige, 121; *Creighton v. Paine*, 2 Ala. 158; *Planters' Bk. v. Fowlkes*, 4 Snead, 461; *Oliver v. Caton*, 2 Md. Ch. Decs. 297; *Trabue v. Ingles*, 6 B. Mon. 84; *Applegarth v. Russell*, 25 Md. 317; *Bright v. Pennywitt*, 21 Ark. 130.

² *Kershaw v. Thompson*, 4 Johns. Ch. 609; *Frelinghuysen v. Colden*, 4 Paige Ch. 204; *Van Hook v. Throckmorton*, 8 Paige, 32; *McGown v. Wilkins*, 1 Paige, 121.

as the property is in the control of the court, and custody of the law, and all right of all other parties to the suit is divested by the proceedings; so that an ejectment or action will not lie at their suit against such purchaser in possession, for the possession of the premises. The only legal title, and the right of possession are by the proceedings *severed* for the time being, and the purchaser is not only entitled to possession from the time of ratification (or confirmation) of the sale, when so placed in possession by the court, but furthermore, from *that time* the property is, as to fire, at his risk. To hold otherwise would render insecure the larger portion of judicial sales. Having paid the purchase money, and been put in possession by the court, the law, after *lapse of time*, presumes that the trustee did his duty and conveyed by deed as ordered by confirmation or ratification by the court.¹

§ 166. The purchaser is not entitled to possession as a matter of right, however, until he obtains the deed, before which time he has no claim to such assistance of the court, except at its discretion, as where sale is on a credit, so that until payment of the purchase money and delivery of the deed to the purchaser the purchase is not complete, and the transaction, as a sale, remains in an unperfected or executory state.²

§ 167. But these summary methods of putting a purchaser at judicial sale into possession, or of forcing him to comply with his purchase, are not understood to be within the powers of a mere probate court making sales of a decedent's lands under the statute. The purchaser at such sales will be left to his remedy at law by action of ejectment, or whatever legal remedy by action stands in lieu thereof, in case, as in some of the States, the action of ejectment be abolished.³

§ 168. If, on the other hand, the purchaser at a sale of lands in probate, refuse to complete the purchase and pay the purchase money, then, instead of the coercive process which a chancery court of general jurisdiction might resort to, and which is not among the powers of the probate court, the property may be sold over again, and if for a less sum the administrator may recover the difference from such first purchaser, and if it amounts

¹ Lannay's Lessee *v.* Wilson, 30 Md. 536, 550; Casey's Lessee *v.* Inloes, 1 Gill, 503, 505; England *d.* Syburn *v.* Slade, 4 T. R. 682.

² Myers *v.* Manny, 63 Ill. 211.

³ Butler *v.* Emmett, 8 Paige, 12.

to more than what will pay the debts, the residue is a trust fund for the widow and heirs of the deceased.¹

XIV. RATIFICATION BY THE PARTY AFFECTED, OR BY LAPSE OF TIME.

§ 169. Though a sale be not legally binding in the first instance, yet it may become so by ratification, either express or implied, of the party whose property is sold.²

Thus a sale by guardian, of a ward's lands, is ratified if the ward, when of full age, receive and accept the proceeds of the sale with knowledge of the circumstances.³

And so of an acceptance by the heirs at law of their respective shares of the purchase money of land sold by the administrator of a decedent with full knowledge of the condition of things; they thereby ratify the sale and may not thereafter contest its validity,⁴ unless for fraud unknown to them when they received the procceds.⁵ And where the widow of an intestate sold the equitable interest of the deceased, in a parcel of land, without any authority, it was held that the heirs at law, by receiving the purchase money affirmed and ratified the sale.⁶

XV. HOW AFFECTED BY RECORDING ACTS.

§ 170. It is a prevailing principle, that judicial and execution sales of real property are within the recording acts of the respective States wherein they are made, and therefore that conveyances made therein are, by omission to record the deeds, in like manner liable to be defeated as in cases of ordinary conveyances, and so in like manner will take priority, as ordinary conveyances

¹ Cobb *v.* Wood, 8 Cush. 228; Mowry *v.* Adams, 14 Mass. 327.

² Michoud *v.* Girod, 4 How. 503, 561; Scott *v.* Freeland, 15 Miss. 409, 420; Tooley *v.* Gridley, 11 Miss. 493; Henderson *v.* Herrod, 23 Miss. 434.

³ Scott *v.* Freeland, 15 Miss. 409, 420; Ferguson *v.* Bell, 17 Mo. 347; Ward *v.* The Steamer Little Red, 8 Mo. 358; Highley *v.* Barron, 49 Mo. 103. (And a person seeking to avoid the sale, after receiving the purchase money, must refund the benefit by him received. Kerr *v.* Bell, 44 Mo. 120.) Mitchel *v.* Harris, 43 Miss. 314; Redus *v.* Hayden, 43 Miss. 614.

⁴ Lee *v.* Gardiner, 26 Miss. 521; Jennings *v.* Kee, 5 Ind. 257, 259; Maple *v.* Kussart, 53 Penn. St. 348; Michoud *v.* Girod, 4 How. 503, 561.

⁵ Michoud *v.* Girod, 4 How. 503.

⁶ Jennings *v.* Kee, 5 Ind. 257, 259.

may, over unrecorded ordinary conveyances.¹ In *Gower v. Doheney*, cited from 33 Iowa, DAY, C. J., says: "It is well settled that a *third person*, who purchases at a sheriff's sale, without notice of outstanding equities, is entitled to the same protection as any other purchaser without notice, and for value;" and that "it is a wholesome rule of equity that, where one of two innocent persons must suffer, the loss will fall upon that party who has been guilty of the first negligence." And in *Halloway v. Platner*, 20 Iowa, 123, the same court, LOWE, J., assert the same principle in favor of the execution purchaser, when the execution creditor is the purchaser. The court say: "But when a creditor merges his judgment into a title, without actual or constructive notice of prior equities, he becomes a purchaser within the meaning of Section 1211 of the Revision, and is entitled to equal protection in the absence of equitable circumstances, with any other subsequent *bona fide* purchaser."

XVI. NOT AFFECTED BY MERE IRREGULARITY.

§ 171. Judicial sales are not affected in collateral proceedings by mere irregularity. Objections of this description must be made by appeal. It is the policy of the law to uphold and enforce the proceedings of the courts, when jurisdiction has attached, and especially sales by the court itself to *bona fide* purchasers.²

§ 172. But if jurisdiction is wanting in the court making them, they are absolutely void.³ And sale of a minor's lands

¹ Smith's L. Cas. in Eq. vol. 1, p. 75; Jackson *v.* Chamberlain, 8 Wend. 183; McNitt *v.* Turner, 16 Wall. 352; Parker *v.* Pierse, 16 Iowa, 227; Brookfield *v.* Goodrich, 32 Ill. 363; Kennedy *v.* Northup, 15 Ill. 148; Waldo *v.* Russell, 5 Mo. 387; Scribner *v.* Lockwood, 9 Ohio, 184; McFadden *v.* Worthington, 45 Ill. 362; Stewart *v.* Freeman, 22 Penn. St. 120; Goepp *v.* Gartiser, 35 Penn. St. 130; Norton *v.* Williams, 9 Iowa, 529; Fosdick *v.* Barr, 3 Ohio St. 471; Massey *v.* Wescott, 40 Ill. 160; Ohio Life Ins. Co. *v.* Ledyard, 8 Ala. 866; Orth *v.* Jennings, 8 Blackf. 420; Wood *v.* Chapin, 13 N. Y. 509; Wood, Bacon & Co. *v.* Young, 38 Iowa, 102, 108; Hoxie *v.* Price, 31 Wis. 82; Ehle *v.* Brown, 31 Wis. 405; Gower *v.* Doheney, 33 Iowa, 36; Vannice *v.* Bergen, 16 Iowa, 556; Evans *v.* McGlasson, 18 Iowa, 152; Halloway *v.* Platner, 20 Iowa, 121.

² Dorsey *v.* Kendall, 8 Bush. 294; Shackleford *v.* Miller, 9 Dana, 273; Benningfield *v.* Reed, 8 B. Mon. 102; Robinson *v.* Redman, 2 Duvall, 82; Cockey *v.* Cole, 28 Md. 276; Wilson *v.* Miller, 30 Md. 82; Schley's Lessee *v.* The Mayor, etc., of Baltimore, 29 Md. 34.

³ Dorsey *v.* Kendall, 8 Bush. 294.

will be confirmed, although irregular, if such be the only objection, when in the opinion of the chancellor the sale is beneficial to the minor, and that it is for the interest of the minor that it shall stand.¹

XVII. HOW PURCHASER AFFECTED BY SERVITUDES AND EASEMENTS.

§ 173. The purchaser of real estate at a judicial sale takes subject to any servitude or easement to which the property is liable, if the same is apparent at the sale, and has been continuous for a sufficient time to establish a right of user in others.² In the case here cited, ten years and over was considered sufficient time to raise such presumption of a right as would become obligatory.

XVIII. THE MAXIM "CAVEAT EMPTOR" APPLIES.

§ 174. The rule is, as to all judicial sales, except as regards fraud, that the maxim *caveat emptor* applies. Let the buyer beware. There is no warranty of title or quality. They are sales by the court, and there is no one to go back on if the buyer takes nothing. If the person conducting the sale under the court make a paper warranty, he binds only himself. This he should not do.³

§ 175. But although sales, whether judicial or on execution are made subject to the doctrine of *caveat emptor*, yet if misrepresentations be made by the person selling, and be relied on by the buyer, to the injury of the latter, the sale will be set aside,

¹ Daniel *v.* Leitch, 13 Gratt. 195.

² Cannon *v.* Boyd, 73 Penn. St. 179; Seibert *v.* Levan, 8 Penn. St. 388; Overdeer *v.* Updegraff, 69 Penn. St. 110.

³ Worthy *v.* Johnson, 8 Geo. 236; Ramsey *v.* Blalock, 32 Geo. 376; Preston *v.* Fryer, 38 Md. 221; Glenn *v.* Clapp, 11 Gill. and J. 1; Mervine *v.* Vanlier, 3 Hals. Ch. 34; Renton *v.* Maryott, 6 C. E. Green, 123; Lynch *v.* Baxter, 4 Tex. 431; Poor *v.* Boyce, 12 Tex. 440; Baker *v.* Coe, 20 Tex. 429; Browne *v.* Christie, 27 Tex. 73; Edmonson *v.* Hart, 9 Tex. 554; Williams *v.* McDonald, 13 Tex. 322; Bassett *v.* Lockard, 60 Ill. 164; McManus *v.* Keith, 49 Ill. 389; Owings *v.* Thompson, 4 Ill. 502; Hamilton *v.* Pleasants, 31 Tex. 638; Aven *v.* Beckom, 11 Geo. 1; Threckelds *v.* Campbell, 2 Gratt. 199; Bishop *v.* O'Conner, 69 Ill. 431. (Therefore the purchaser will not be subrogated to rights of the creditor, nor can he recover back purchase money for mere failure of title. *Ibid.*)

and the money will be restored, if not already paid over or distributed.¹

XIX. DECREE FOR SALE NOT AFFECTED BY CHANGE OF GOVERNMENT.

§ 176. A decree of sale of lands is not invalidated by the county wherin the land is situated, and the court in which the decree was made, being included in a new State, before perfecting the sale; nor is the appointment of new commissioners necessary. The sale may be legally made and perfected, notwithstanding the change by the commissioners originally appointed and the court of the county so included in the newly created State.² And if the sale be on a credit, such change of sovereignty between the making of the original decree and completion of the sale is no defense to an action for the purchase money.³

XX. DECREE OF SALES ON DEEDS OF TRUST.

§ 177. In decreeing sales of realty on trust deed, the proper practice is to order the sale to be made on the terms provided in the deed. Not merely by reference thereto, but by specifying the same in the decree. The object of judicial intervention is to enforce the trust, upon the term thereof, and not to change the same.⁴ If, from any cause, it becomes impracticable for the trustee to carry out the trust, or he refuses to do so, a court of equity may enforce it, but are as much bound to conform to the tenor of the deed as the trustee himself would be.

XXI. JUDICIAL SALE OF TRUST ESTATE OF MINORS.

§ 178. An unproductive trust estate in lands, enuring to the benefit of a mother during her life, with remainder to children, may be sold in chancery under decree of court and the proceeds distributed equitably to the mother and children in absolute ownership.⁵ In such case, the court and not the master selling must ascertain the value of the mother's portion and order the

¹ Preston *v.* Fryer, 38 Md. 221; Glenn *v.* Clapp, 11 Gill. and J. 1; Mervine *v.* Vanlier, 3 Hals. Ch. 34; Renton *v.* Maryott, 6 C. E. Green, 123.

² Shields *v.* McClung, 6 W. Va. 79.

³ Ibid.

⁴ Hogan *v.* Duke, 20 Gratt. 244.

⁵ Curtiss *v.* Brown, 29 Ill. 201; Voris *v.* Sloan, 68 Ill. 588.

payment of the same to her;¹ and, in fixing the value, the court will follow the statutory rule, where one exists, laid down for the ascertainment of the value of dower in real estate.²

XXII. SALES AFTER AN APPEAL IS TAKEN.

§ 179. Decretal sales made after an appeal taken from the decree, without giving bond for a supersedeas, will, if the appeal is by the defendant, be valid.³ But if the plaintiff enforce his decree by sale, while he has himself appealed from it, the rule is otherwise; the sale will not be upheld.⁴

XXIII. OPENING THE BIDDINGS FOR AN ADVANCE BID.

§ 180. Though courts of equity and others, in the exercise of equity jurisdiction and powers, in making sales, will ordinarily open the biddings on the offer of an acceptably advanced bid of larger amount over an inadequate price at which the property has been struck off,⁵ yet, after confirmation, the biddings will not be opened, except for fraud.⁶

§ 181. In cases where by reason of an advanced bid being interposed after report of sale by an administrator, or executor, in probate, the probate court decline to approve or confirm the sale, or authorize the completion thereof, the court have power, at its discretion, to order a resale, or to accept the advanced bid so put in, and, on payment thereof, to cause a conveyance to be made to the purchaser under such advanced bid.⁷ And this, too, at the same or subsequent term of court to which the sale is reported.⁸

§ 182. So, before confirmation, a resale will be ordered on a considerably advanced bid, where there was surprise and apparent sacrifice by reason of a promise to postpone the sale and a failure to do so by accidental delay of a telegram.⁹

¹ Curtiss *v.* Brown, 29 Ill. 201. ² Ibid.

³ Morton's Admrs. *v.* Underwood, 49 Ala. 419; Whiting *v.* Bank U. S. 13 Pet. 6.

⁴ Bradford *v.* Bush, 10 Ala. 274; Tarleton *v.* Goldthwaite, 23 Ala. 346.

⁵ Hays' Appeal, 51 Penn. St. 58; Childress *v.* Hurt, 2 Swan, 487; Wright *v.* Cantzon, 31 Miss. 514, 517.

⁶ Thompson *v.* Cox, 8 Jones, (N. C.) 311; Asbee *v.* Cowell, Busbees' Eq. (N. C.) 158; Mitchell *v.* Harris, 43 Miss. 314, 315; State Bank, *Ex parte*, 1 Dev. & Batt. Eq. 75.

⁷ Griffin *v.* Warner, 48 Cal. 383. (The court being, in such cases, the vendor, as we have seen, ante section 8, it may waive the formalities of a resale and accept the advanced bid as if made either to the administrator or to the court itself.)

⁸ Griffin *v.* Warner, 48 Cal. 383. ⁹ Demaray *v.* Little, 19 Mich. 244, 248, 249.

CHAPTER IV.

JUDICIAL SALES TO ENFORCE LIENS ON REAL PROPERTY.

- I. MUNICIPAL LIENS FOR STREET IMPROVEMENTS.
- II. MECHANIC'S LIENS.
- III. MORTGAGE LIENS.
- IV. VENDOR'S LIENS.

I. MUNICIPAL LIENS FOR STREET IMPROVEMENTS.

§ 183. Sales in equity for the enforcement of municipal liens on land, arising under ordinances or statutes for street improvements, are regarded as judicial sales.¹ If there be no special method provided for the enforcement of liens of a municipal corporation for street improvements, or if there be a method prescribed, but not prescribed as exclusive, then, in either case, the remedy may be sought and the enforcement had by decree and sale, in equity, on application by bill or petition, upon the general principle of equity jurisdiction for the enforcement of liens. In *McInerny v. Reed*,² the Supreme Court of Iowa, DILLON, Justice, lay down the rule in the following language: "We take a view of the matter which upholds the power granted and makes it effective, but which duly guards and preserves the rights of the property owner. The expenditure is declared to be a lien, and liens may be enforced in equity, and the power 'to collect' given by the charter may be exercised by commencing an action in court to have the lien enforced." And again, in the same case, the court say the city or corporation may, "if its right is not barred, commence a suit in equity to collect its tax and enforce its lien, we have no doubt, and it was so expressly adjudged in the case of the *Mayor, etc., v. Colgate*, above cited."

And we may not regard the use of the word "action" in this opinion as applied in its ordinary and original legal sense, and, therefore, as importing a proceeding at law, but rather in the

¹ *Ohio Life Ins. & Trust Co. v. Goodin*, 10 Ohio St. 557; *Hamilton v. Dunn*, 22 Ill. 259; *Husbands v. Jones*, 9 Bush. 218.

² 23 Iowa, 410; *Mayor v. Colgate*, 12 N. Y. 140.

extended sense in which the Revision of Iowa has used it, alike in reference to both equitable and legal proceedings. This is clearly apparent by the subsequent reference to a "suit" in "equity" in the opinion of the learned judge.

§ 184. Such liens and sales are the creatures of the statute — are regulated thereby — and the power of the court is said to be limited to a confirmation or rejection of the sale when made, whether the sale be by virtue of a judgment at law or decree in chancery. The court can not modify, but must confirm or reject the sale.

The principle, in either case, is the same. The right and lien are purely statutory, were unknown to the common law and ordinary chancery jurisdiction. The statute in the several States is the judicial guide as to the extent and enforcement of such liens, although, in the very nature of the case, the exercise of more or less of chancery powers is involved in the proceeding, as in addition to the ordinary judgment, if the proceeding be at law, an order or decree of condemnation and sale of property specified and described therein is necessary.¹

§ 185. In *Ohio Life Ins. and Trust Co. v. Goodin*,² arising on street improvements, the sale was made on decree and under the appraisement law of that State. The ground and a building thereon were appraised together and sold as an entirety. After confirmation of the sale and payment of the purchase money, it was discovered that there was less ground by three feet frontage than the quantity sold. It was held that a corresponding deduction from the price could not be made by the court. That there was no rule by which the discrepancy in value could be arrived at, as the purchaser had lost no part of the building, but a part of the ground only which he had contracted for, and the whole had been appraised and sold together. Moreover, that were it otherwise, the court could only confirm, or vacate, the sale as it was made, and could not alter or modify it in any substantial particular. It might correct mistakes in computa-

¹ *Ohio Life Ins. & Trust Co. v. Goodin*, 10 Ohio St. 557; *Canal Co. v. Gordon*, 6 Wall. 561, 568; *McInerny v. Reed*, 23 Iowa, 410; *Dillon, Municipal Corps. Sec. 660*. A personal action will, in some cases, lie for the money, as for instance an ordinary action at law where the party has petitioned for or otherwise acquiesced in the improvement, but this will not reach the lien. *Eschbach v. Pitts*, 6 Md. 71.

² 10 Ohio St. 557.

tion and other errors, but not change the terms of the sale when made. In this case, the court say: "The purchaser gets, with his twenty-seven feet, all the improvements which entered into their estimate of the value of the entire lot. How much of this estimate was for the 'ground' and how much for the 'improvements' does not appear, and no computation could have ascertained it." The court add, that the improvements "may have been very valuable"; that there "was no previous measurement to ascertain the frontage of the lot, and no express reservation of a right to do so, before or at the time the money was paid, which was several days prior to filing the motion at special term, one month after the sale"; that "judicial sales should always be certain, and not subject to any future contingencies, so that all bidders may have equal advantages"; that the power of the court is "to confirm or set aside, but not to modify the sale or its terms"; that if "the sale ought not to be confirmed as it was made, the best, and only proper remedy, is a resale, with or without valuation, as justice may require."¹

§ 186. To enable a municipal corporation to enforce payment of a tax levied for street improvements by judicial proceedings against the property or owner, the ordinance under which the proceedings are had, must have been duly published as required by law. Until such publication no liability to pay is incurred. In the case of *Dubuque v. Wooton*,² a suit in chancery, commenced by the city of Dubuque to enforce payment for street improvements, the Supreme Court of Iowa held, that for want of such publication, the complainant was not entitled to relief. That court, BECK, Justice, say: "The publication required by the second section of the ordinance is undoubtedly necessary in order to fix the liability of the tax-payer, for, by the terms of the ordinance, the tax is declared to be due and payable after the publication is completed. We do not think the tax can become 'due and payable' until this requirement is complied with. The city has chosen to fix this condition to its right to enforce the tax, it must be complied with."

§ 187. Liens of the State, and of municipalities, for ordinary taxes, and also for street improvements, upon real estate, have priority, under the statute, in Pennsylvania, in the distribution

¹ 10 Ohio St. 557.

² 28 Iowa, 571, 574.

of funds realized from sale of the premises, whether the sale be a *judicial* one, or merely ministerial, as on execution at law, and are to be first paid from the proceeds of sale, whether the sale be made upon a lien senior in date or not; and if enough be thus raised to pay these liens of the public, and be so applied, they are thereby discharged; but if not enough, then the lien remains in force to the extent of the unpaid balance of the tax, whether special or general, until the same is paid. And if there be an excess over what thus pays the lien of the public, such excess is to be applied on the individual claim or lien under which the sale is made, and other existing ones in ordinary priority.¹

II. MECHANIC'S LIENS.

§ 188. Mechanic's liens are of modern date, and are creatures of the statute law.² Though given by law, the enforcement of them usually involves the exercise of equitable powers, however in form of law merely, such proceedings may be conducted. Thus the courts have held that the proceeding itself, when not otherwise required by the statute, should be in chancery or according to equity principles and practice.³

¹ Pittsburgh's Appeal, 70 Penn. St. 142. In this case the learned jurist, THOMSON, C. J., says: "It is complained of, and does seem to militate against the maxim *prior in tempore, potior est in jure*. But it ought to be remembered, that these provisions are parcel of a system devised for the collection of taxes and assessments, in which the public is interested. Tax laws often disregard individual equities in favor of the public demands. It is a provision, also, to relieve the public from contests about priorities in distribution, which often vex the citizen and perplex the courts." Philadelphia *v.* Meager, 67 Penn. St. 345. (And if both liens be in favor of the same municipality, the rule is the same. The money is applied to the older lien, and it is thereby discharged to the extent of the sum so applied, though the sale be on the junior lien. But in such case the buyer takes the property discharged of the municipal *junior* lien, on which it is so sold, for the municipality, having itself caused the sale on the younger lien, and received the proceeds on the older, will not be again allowed to enforce the younger for its unpaid balance. It is only when sales are enforced by third persons that, by the statute, the municipal lien receives the proceeds until satisfied; and if not fully satisfied, the purchaser takes subject to the undischarged balance. *Ibid.*)

² Canal Co. *v.* Gordon, 6 Wall. 561, 571; Cairo & Vincennes R. R. Co. *v.* Fackney, 78 Ill. 116; Clifton *v.* Foster, 103 Mass. 233; Hilliard *v.* Allen, 4 Cush. 532.

³ Hamilton *v.* Dunn, 22 Ill. 259; Rose *v.* Persse & Brook's Works, 29 Conn. 256; Goodman *v.* White, 26 Conn. 317, 319, 329; McInerny *v.* Reed, 23 Iowa, 410; Cairo & Vincennes R. R. Co. *v.* Fackney, *supra*. In Georgia, however, they are held to be enforceable at law, and not in equity. Coleman *v.* Freeman, 3 Geo. 137.

In the case of *Hamilton v. Dunn*, the Supreme Court of Illinois, BREESE, Justice, lay down the rule that "suits to enforce 'such liens,' although by statute placed on the common law docket, are yet proceedings in chancery, and governed by the rules of that where they apply and where the act giving the lien has not prescribed different rules."¹ They are regarded in Connecticut as conferring the same rights as a mortgage.²

§ 189. In the case of *Canal Co. v. Gordon*,³ the court say: "They were unknown to the common law and equity jurisprudence both of England and of this country. They were clearly defined and regulated in the civil law.⁴ Where they exist in this country they are the creatures of local legislation. They are governed in everything by the statutes under which they arise." This was a case coming up on appeal in chancery from the decree of the circuit court of the United States for the northern district of California. It involved the question as to whether the mechanic's or builder's lien for constructing one section of a canal flume and aqueducts, attached to the whole canal or only to the section on which the work was bestowed. The Supreme Court held that the lien attached only to the section on which the work was done. That court says: "The lien is given to contractors and laborers upon the ditch or flume 'which they may have constructed or repaired * * * to the extent of the labor done and materials furnished.' The work of Gordon was all done upon the upper section. He had nothing to do with the lower section. So far as he was concerned, and for all the purposes of this litigation, they were distinct and independent works. A different principle would produce confusion and lead to serious evils."⁵

§ 190. By analogy to the general doctrine of relation, such sales and conveyances made thereon bear relation to the time of the inception of the lien if the statute be conformed to, and such date be ascertained and fixed by the order or decree of sale as against subsequent lien holders and purchasers.⁶

¹ 22 Ill. 259, 261; *Clark v. Boyle*, 51 Ill. 104; *Marvin v. Taylor*, 27 Ind. 73.

² *Goodman v. White*, 26 Conn. 317, 319, 320.

³ 6 Wall. 561, 571.

⁴ *Domat Secs.* 1742, 1744.

⁵ *Canal Company v. Gordon*, 6 Wall. 572.

⁶ *Jackson v. Davenport*, 20 Johns. 537; *Jones v. Swan*, 21 Iowa, 184; *Redfield v. Hart*, 12 Iowa, 355; *State of Iowa v. Lake*, 17 Iowa, 215.

Thus, in Oregon, the ruling is, as to mechanic's liens, that it ought to appear in the judgment or decree at what time the lien commenced to run or had its inception.¹ That if nothing in that respect appears in the record of the judgment, then the lien is regarded as commencing only with the date of the judgment.² In such latter case, liens of a prior date take priority thereof.³ The proper process to enforce mechanic's liens in Oregon is process of execution.⁴

§ 191. While the lien of a judgment ordinarily runs from its date, and sales and conveyances under process thereon relate back to such date, yet if the judgment or decree be founded upon a *statutory* lien, as a mechanic's, or lien for street improvement, or on a mortgage deed, it relates back to the very inception of the lien. Hence, in the enforcement thereof the date of the mortgage and record thereof, if on a mortgage, or if a mechanic's or street improvement lien, then the date at which they accrued should be ascertained by the court, and made to appear by the record of the decree or judgment. And as to subsequent purchasers under the debtor, either voluntarily made or made under other liens or legal process, it were proper to refer to such original date in the officer's deed, so as to make the same notice of record.—Dewitt's Appeal, 76 Penn. St. 283.

§ 192. In Indiana the practice is to render a judgment at law for the debt against the owner of the property who was such at the time of executing the work, and also to make a decree in equity against the property itself, condemning it to be sold for the amount found due to the plaintiff. Thus the proceeding, as is necessarily the case where the proceeding is in *personam* as well as *in rem*, becomes a mixed one of law and equity.⁵

§ 193. In such cases it follows that if the amount be not realized on the decree, a writ of ordinary execution can go against the property generally of the defendant to enforce the personal judgment for the unsatisfied residue of the judgment. A sale on the latter would be a ministerial one, while a sale on the decree in equity would partake of the character of a judicial sale.

§ 194. To make a valid sale of lands under a decree to enforce a

¹ Kendall v. McFarland, 4 Oregon, 292.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Marvin v. Taylor, 27 Ind. 73.

mechanic's lien, all persons in interest in the premises are to be made parties. Therefore if the debtor who procured the work to be done upon the premises convey the property to a *bona fide* purchaser after the execution of the work, and before commencement of proceedings to enforce the lien, and the conveyance be recorded (or come otherwise to the knowledge of the creditor,) the grantee must be made a party defendant, else he will not be affected in his rights under his conveyance by the *decretal sale*.¹

§ 195. In the leading case cited from Indiana, the decree expressly reserved the rights of all persons not made parties to the suit, but such would be the general effect without the reservation. A party in interest (not buying *lis pendens*) must have his day in court in adversary proceedings.

§ 196. As between a prior mortgage lien and a mechanic's lien on one and the same property, the rule in Illinois is to give the mechanic's lien its *pro rata* proportion of the increased value caused to the property by the improvement when the fund arising from the sale is insufficient to satisfy both. Not the *cost* of the improvement, but such part of the proceeds of the sale as bears a just proportion to the increase thereof caused by the betterments placed on the property by the mechanic.² And in the same State, as between two or more mechanic's liens against the same property, and of equal priority, the proceeds of sale are equally distributed among them.³

§ 197. In Nevada it is held that a purchase and deed under a mortgage foreclosure and sale, made and perfected before proceedings were commenced for enforcing a mechanic's lien on the same premises, carries the title as against the purchaser under the mechanic's lien, when in the proceedings to enforce it the purchaser under the mortgage decree was not made a defendant, although the mortgage deed be junior in point of date to the inception of the lien of the mechanic. For, by the purchase and deed under the decree foreclosing the mortgage, the legal estate passed to the grantee in such deed, and could not be divested by the sale under the mechanic's lien without having

¹ *Ibid.*; *Brown v. Wyncoop*, 2 Blackf. 230; *Holland v. Jones*, 9 Ind. 495; *Shaw v. Hoadley*, 8 Blackf. 165.

² *Croskey v. N. W. Manf. Co.*, 48 Ill. 481; *Howett v. Selby*, 54 Ill. 151; *Din-gledine v. Hershman*, 53 Ill. 280.

³ *Buchter v. Dew*, 39 Ill. 40.

made the mortgage purchaser a party so as to give him a day in court, and an opportunity to contest the lien of the mechanic.¹

Nor does it matter that the deed under the mortgage sale was made to an assignee of the purchaser. The effect is the same as if made to the purchaser himself. "The sheriff had a right, on sufficient evidence of the assignment of the certificate of sale, to make the deed" to the assignee.²

The same principle as to priority is asserted in Illinois, under the statute respecting mechanic's liens. In *Williams v. Chapman*,³ the court say: "The right of those not made parties are not affected by the decree, or any proceeding under it;" and hold that the purchaser, in that case, under a mortgage foreclosure not having been made a party to the suit on the mechanic's lien, had the superior title even if the mechanic's lien were the older, though it was not.

§ 198. In Iowa, the lien of the mechanic attaches from the commencement of the work. It continues without any effort to perpetuate it until ninety days after the work is completed and materials furnished. Within the ninety days it is the duty of subsequent incumbrancers to ascertain if such lien exists. In default thereof, the lien of the mechanic will override such incumbrances originating within the ninety days. Within the ninety days the mechanic must file with the clerk of the court notice of his lien and the amount thereof. After that time, and after such filing, such notice is notice to subsequent incumbrancers, and they take subject to the mechanic's lien. Omission to file the notice will postpone the mechanic's lien in favor of such subsequent incumbrancers and purchasers.⁴ Not, however, if they otherwise have notice of the lien.⁵

§ 199. In the same State it is held that the erection of such a structure on land, at the request of the purchaser thereof, who is in possession under a contract of purchase which is yet executory, and is never afterward completed by payment of the purchase money and procurement of a conveyance, entitles the mechanic to a lien against the building so erected.⁶

¹ The matter of Smith, 4 Nevada, 254; but see *State of Iowa v. Eads*, 15 Iowa, 114, where the contrary doctrine is substantially held.

² *The Matter of Smith*, 4 Nev. 254, 260.

³ 17 Ill. 423; *Kimball v. Cook*, 6 Ill. 427; *Kelly v. Chapman*, 13 Ill. 534.

⁴ *Jones v. Swan*, 21 Iowa, 181.

⁵ *Noel v. Temple*, 12 Iowa, 276, 281. ⁶ *Stockwell v. Carpenter*, 27 Iowa, 119.

Such is the ruling under the statute which declares that, "The lien for the things aforesaid, or work, shall attach to the buildings, erections, or improvements, for which they were furnished or the work was done, in preference to any lien," etc., and that such building may be "sold under execution, and the purchaser may remove the same."

§ 200. In Iowa, judgments given for mechanic's liens are enforceable by special execution.

By statute such special execution is to conform to the judgment, and the sale shall be made as on ordinary writs of execution.¹ The statute also declares that the "lien shall attach to the building, erections, or improvements, for which they were furnished or the work was done, in preference to any prior lien, or incumbrance, or mortgage upon the land upon which said building, erections, or improvements, have been erected or put, and any person enforcing such lien may have such building, erections or improvements sold under execution, and the purchaser may remove the same within a reasonable time thereafter." Under this statute it is held that a sale on special execution running against a house and ground, issued on a mechanic's lien, judgment entered against the house alone is void² in a contest between the purchaser under the special execution and a prior mortgagee.³

On a proceeding to enforce by foreclosure such prior mortgage, the court will treat the execution sale as void, and will provide for discharge of the mechanic's lien out of the proceeds of the mortgage sale; and although the priority of the mechanic's lien attaches only to the house or proceeds of sale thereof, yet if the court award to such lien a general priority of payment from the proceeds of both house and ground, it is not a matter of such error as the holder of the mechanic's lien can complain of. If there be error, the error is in his favor.⁴

§ 201. Mechanic's liens being given by statute only, they can only exist within the *terms* thereof. So that a sale of real estate held in *fee* under a writ of execution or order, emanating from a judgment which is declared to be a mechanic's lien upon the

¹ Code of Iowa of 1873, Sec. 2140, 2141, et seq.

² Wilson *v.* Reuter, 29 Iowa, 176.

³ Ibid.

⁴ Ibid.

property sold, is inoperative as to the matter of the supposed lien, where the law gives such lien only upon *leasehold estates*. The effect of such a judgment, and sale under execution issued thereon, is none other than that of a sale on ordinary judgment and execution.¹ And if the sale be on several other writs of execution, as well as on the one emanating from the supposed mechanic's lien judgment, the fund will be distributed according to priority of lien of the *judgments*, to be tested by the date of their entry.²

§ 202. In Pennsylvania, mechanic's liens given by statute "upon leasehold estates and property thereon," do not extend to estates in *fee*.³

Therefore, where real estate in *fee* is sold under several judgments, one of which purports to be also for a *lien* for materials and labor furnished and done under a mechanic's lien law, giving such liens as against *leasehold estates*, but not as against estates in *fee*, it is held, in the distribution of the proceeds of sale, where there was also a sale of personal property upon the same writs, that the fund arising from sale of the *realty* be distributed or applied on the writs of execution in the priority and order of their entry, and that of the personal estate in the order or priority of the issuance of the writs of execution.⁴

§ 203. When, by a new rule of statute law of a State, the doctrine of mechanic's lien is changed, the old law remains the law of the forum for liens arising under it, and such liens, both as to the right and as to the remedy, are to be enforced in the same manner as if no change had been made in the law; and more especially when the new statute substantially continues or embodies in it the substance of the old one.⁵

§ 204. Such laws are to be liberally construed, so as to secure their benefits to those for whom intended by the legislature, for the builders, by their expenditures, do in part create the very property to which the liens attach.⁶

§ 205. If there be different jobs of work for which liens are

¹ Dorsey's Appeal, 72 Penn. St. 192.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Skyrme v. The Occidental Mill & M. Co., 8 Nevada, 219.

⁶ Ibid.; Galbreath, Stewart & Co. v. Davidson, 25 Ark. 490; Holliday v. Cromis, 2 Cal. 69; Tuttle v. Montford, 7 Cal. 360; Brown v. Story, 4 Met. (Ky.) 316.

claimed, the notice required by law to secure the lien, and other preliminaries, are to be given and done, as to each one, within the time required;¹ but if the lien claimed be for one job on an entire contract or undertaking, then, notwithstanding performance of the work may have taken place at different times and was not continuous, yet due notice and preliminary action are all that are required to secure the lien, for the contract being entire, the lien bears relation to all the work done under it essential to a proper performance.²

§ 206. The failure to file the claim within the time required by law, does not defeat the lien of a mechanic as against the debtor himself; but only as against subsequent purchasers or subsequent incumbrancers.³

If the lien be filed within the limited time so that it cuts off junior incumbrancers, they must nevertheless be made parties to proceedings to enforce the lien of the mechanic, or they will be entitled to redeem from sale made thereon, upon the ordinary principles of redemption by junior incumbrancers and subsequent purchasers.⁴ But if they do not thus redeem, the sale will carry the fee to the purchaser, so as to protect him in his legal right to the premises as against such non-redeeming subsequent purchasers or incumbrancers.⁵

§ 207. When a mechanic's lien debtor is placed in bankruptcy in the United States Court, the validity of the lien is not prejudiced thereby, but will be protected in law, and as bearing relation back to the inception of the work on account of which it exists, and the United States Court, if it sell the property, will prefer the lien of the mechanic in the distribution of the proceeds; or it may sell, subject to the lien of the mechanic, and leave the State court to enforce the mechanic's lien against the property,⁶ and in the latter case the proceeding in the State court and title arising thereon, if terminating in a

¹ *Skyrme v. The Occidental Mill & M. Co.*, 8 Nevada, 219.

² *Ibid.*

³ *Evans v. Tripp*, 35 Iowa, 371; *Noel v. Temple*, 12 Iowa, 276; *Jones v. Swan*, 21 Iowa, 181.

⁴ *Evans v. Tripp*, 35 Iowa, 371.

⁵ *Ibid.*

⁶ *Douglass v. St. Louis Zinc Co.*, 56 Mo. 388; *Clifton v. Foster*, 103 Mass. 233; *Fowler v. Hart*, 18 How. 373; *Pulliam v. Osborne*, 17 How. 471; *Wiswall v. Sampson*, 14 How. 61; *Houston v. City Bk. of New Orleans*, 6 How. 486.

sale, will take priority over the one emanating from the sale in bankruptcy made subject to the lien.¹ But pending the bankrupt proceedings the State court can make no order enforcing the lien; pending the cause, it should be continued.²

§ 208. In Massachusetts, the ruling is, that a mechanic's lien, when established, relates back to the *time* of making the contract for the work,³ and takes priority over mortgages made subsequent thereto.⁴

Though the section of the act giving the lien does not in exact terms state to what time the lien relates back, yet a subsequent section provides in substance that such lien shall override in priority mortgages duly made and recorded subsequent to the *date* of the *contract* on which the lien is predicated. From which it is held that therefore by implication the lien commences to exist at the time of making the contract.⁵

III. MORTGAGE LIENS.

§ 209. Foreclosure sales in equity of mortgaged premises are an innovation on the original remedy of the mortgagee. He had a right at common law, on breach of condition, to take possession of the property, and to a prudent use of the same, but subject to an accounting for the rents and profits thereof. He was moreover bound to deliver back possession when out of such income the debt, interest and charges were satisfied. Or, as an alternative remedy, he might proceed by bill in chancery and foreclose the debtor's equity of redemption by a decree cutting off the right to redeem and vesting in the mortgagor the entire property and estate.⁶ This latter is termed a strict foreclosure. This procedure, however, was liable to impose great hardship on one or other of the parties, as the property might

¹ *Wiswall v. Sampson*, 14 How. 67; *In re McClellan*, 1 N. Bank. Reg. 389; *In re Bowie*, 1 N. Bank. Reg. 628; *Foster v. Ames*, 2 N. Bank. Reg. 455.

² *Clifton v. Foster*, 103 Mass. 233; *Norton v. Boyd*, 3 How. 426; *Wiswall v. Sampson*, 14 How. 52, 67; *Peale v. Phipps*, 14 How. 368; *Taylor v. Carryl*, 20 How. 583; *Foster v. The Richard Busteed*, 100 Mass. 409.

³ *Dunklee v. Crane*, 103 Mass. 470; *Howard v. Veazie*, 3 Gray, 233; *Howard v. Robinson*, 5 Cush. 119; *The Granite State*, 1 Sprague, 277.

⁴ *Ibid.*

⁵ *Dunklee v. Crane*, 103 Mass. 470.

⁶ 4 Kent, Com. 181; *Bradley v. Chester Valley R. R. Co.*, 36 Penn. St. 141, 150, 151; *Robertson v. Campbell*, 2 Call, 428.

be of much less or much greater value than the amount of the mortgage debt. If the former, the creditor got too little, and if the latter, he got too much for his debt. The creditor being now the owner of the property might sell the same. If by fair sale, the amount produced was less than his debt, he could then proceed, according to some rulings, on his bond, at law, against his debtor for the residue. To obviate these results, and assure a more equitable adjustment of the rights of parties, the most of the American States adopted the system of foreclosure and sale in chancery and causing the fund to be brought into court and applied on the debt, interest and costs, and the overplus, if any, to be paid over to the mortgage debtor;¹ but in case of a deficiency in amount to discharge the debt, interest and costs, the residue of the debt remained against the debtor for which he was proceeded against at law by an action¹, judgment, and execution sale if other property were found. A still further progress was then made in many of the States to avoid the suit at law by allowing a decree or judgment in the same proceeding for the remaining balance of the debt and awarding execution thereon, thus avoiding circuity of action. Sales in each of these proceedings in chancery (but not sales on the judgment and execution for the residue,) are judicial sales. Of these only it is our purpose, under this head, briefly to treat. Mortgage sales, on writ of *scire facias* and other proceedings at law, and in proceedings of a mixed nature, under various statutory innovations as adopted in some of the States, do not properly come under our present title. They are not purely judicial sales. Some are purely ministerial, and others again are of so dubious a character, though made in obedience to judicial decrees as at most to be but *quasi* judicial. As for instance, where the enforcement is by special writ of execution issued to the sheriff, and no report or confirmation of the sale is by law required.

§ 210. In Pennsylvania and some other of the States, equitable foreclosure and sale does not exist, unless a trust be connected with the mortgage and be abused.² The procedure is at law by *scire facias* or other legal process.³

¹ Story, Eq. Jur. Sec. 1025; *Bradley v. Chester Valley R. R. Co.*, 36 Penn. St. 147, 148.

² *Ibid.*; *Willard v. Norris*, 2 Rawle, 56

³ *Bradley v. Chester Valley R. R. Co.*, 36 Penn. St. 141, 151.

§ 211. But the powers of courts of equity to decree a foreclosure and sale of mortgaged premises in general, on a proper case made by bill or petition, and to enforce such decree by judicial sale, and distribute or order the application of the proceeds, is now finally established in most of the States.¹

§ 212. Mortgage sales in equitable proceedings are ordinarily made for cash; but by consent of parties the court will sometimes order the sale to be made on a credit; and may, on complainant's request alone, so direct as to the amount of the debt and interest of the complainant. In the case of *Sedgwick v. Fish*, the court say, "Judicial sales are not, in general, made on credit without the consent of the parties."² The proper person to make them, where there is no statutory regulation to the contrary, is a master or commissioner, appointed by the court and designated in the decree.³ They must be made by him in person, and not by deputy, but he may depute another person to make the same, if such deputed person act in his immediate presence and under his control.⁴

§ 213. The purchaser will not be forced to complete the purchase when the sale was not made at his risk, and he can not be placed in possession without resorting to an action of ejectment, or where he can not have a clear title.⁵

§ 214. After the sale the court, when necessary, will retain control of the case to the perfecting of the ends of justice, and will coerce, by proper process, the delivery of possession of the premises to the purchaser, in case the mortgagor or any person claiming, or coming in under him subsequently to the commencement of the suit, withhold the same from the purchaser. The court will not, in such case, leave the purchaser to his remedy at law.⁶

§ 215. The proper practice is first an order, in case of dis-

¹ Story, Eq. Jur. Sec. 1025; *Bronson v. Kinzie*, 1 How. 318; *Lansing v. Goelet*, 9 Cow. 346; 4 Kent, Com. 181; *Rodgers v. Jones*, 1 McCord, Ch. 221; *Pannell v. The Farmer's Bk. of Md.*, 7 Har. and J. 202; *Bradley v. Chester Valley R. R. Co.*, 36 Penn. St. 141, 148.

² *Hopkins*, Ch. 669.

³ *Heyer v. Deaves*, 2 Johns. Ch. 154.

⁴ *Ibid.*

⁵ *McGown v. Wilkins*, 1 Paige, 120; *Seaman v. Hicks*, 8 Paige, 655.

⁶ *Suffern v. Johnson*, 1 Paige, 450; *Williams v. Waldo*, 4 Ill. 264; *Kershaw v. Thompson*, 4 Johns. Ch. 609; *Frelinghuysen v. Colden*, 4 Paige, 203; *Van Hook v. Throckmorton*, 8 Paige, 33; *Creighton v. Paine*, 2 Ala. 158; *McGown*

obedience thereof, then an injunction, and if need be, a writ of assistance.¹ Such proceedings, however, will not be awarded, usually, to a purchaser from the purchaser at the judicial sale, nor as against one entering though during the pendency of the suit, yet not entering under the mortgage debtor, or other party defendant to the suit.²

§ 216. In case there be a judgment or judgments against the mortgage debtor, prior in date to the mortgage, and a lien on the premises, then such judgments are to be first extinguished out of the proceeds of the mortgage sale.³

§ 217. If there be conflicting claimants to the proceeds of a sale, the court should settle the priorities and rights of the parties before the sale is made, which it will do, on application for that purpose. Such a course not only enables the parties and the master or person selling to act intelligibly as to application of the fund, but also enables the interested parties to bid with knowledge of their rights as to receipt of the proceeds.⁴

§ 218. In case a part of the mortgaged lands be sold by the mortgagor after date of the mortgage, then equity charges the residue in the hands of the debtor with the whole debt, as in favor of the purchaser, or purchasers, and on foreclosure thereafter such residue is first to be sold, under the decree, before resorting to the part conveyed away by the debtor.⁵ If several portions be so sold by the debtor after making the mortgage, then by some of the authorities, the piece last sold by the mortgagor is the first to be sold under the decree, and so on in succession, each piece successively, in the inverse order of their sale

¹ Wilkins, 1 Paige, 121. (But the purchaser is not entitled to be placed in possession, or to have the rents, until he receives the deed. *Mitchell v. Bartlett*, 51 N. Y. 447.)

² *Kershaw v. Thompson*, 4 Johns. Ch. 609; *Frelinghuysen v. Colden*, 4 Paige, 203; *Van Hook v. Throckmorton*, 8 Paige, 33; *McGown v. Wilkins*, 1 Paige, 121.

³ *Van Hook v. Throckmorton*, 8 Paige, 33.

⁴ *Bell v. Brown*, 3 Har. and J. 484.

⁵ *Snyder v. Stafford*, 11 Paige, 71.

⁶ *Massie v. Wilson*, 16 Iowa, 390; *McWilliams v. Myers*, 10 Iowa, 325; *Clowes v. Dickenson*, 5 Johns. Ch. 235; *James v. Hubbard*, 1 Paige, 228; *Gill v. Lyons*, 1 Johns. Ch. 447; *Sibley v. Baker*, 23 Mich. 312, 315; *McKinney v. Miller*, 19 Mich. 142; *Cooper v. Bigly*, 13 Mich. 463, 474; *Mason v. Payne*, *Walker's Ch. R.* 459; *Caruthers v. Hall*, 10 Mich. 40; *James v. Brown*, 11 Mich. 25; *Ireland v. Woolman*, 15 Mich. 253.

by the debtor, until the whole are exhausted or the decree and costs are satisfied. With this exception, however, that so long as any part still remains in the debtor, such part so remaining unsold by him is to be disposed of under the decree before either one of the portions conveyed away by him can be sold under the decree. For as long as any part remains the property of the debtor, equity charges it with the debt to the exemption of the part sold, as between the debtor and his vendee; and the vendee of the residue or of any part thereof takes it subject to such equity, and yet with a like equity in his favor as between him and his vendor to have the residue, if any, belonging to his vendor sold first.¹

In the language of the chancellor, in *Clowes v. Dickenson*, each subsequent purchaser in turn "sits in the seat of his grantor and must take the land with all its equitable burdens."

And so likewise in regard to subsequent incumbrances of the mortgaged estate. The incumbrances vesting last will first be postponed, and so on in succession in an order inverse to their respective dates, in like manner as above stated in reference to sales of the mortgaged property in parcels.²

§ 219. But by other authorities the contrary is held, both in reference to subsequent sales and subsequent incumbrances of mortgaged premises, and the ruling is that although in case the mortgage debtor only dispose of a part of the mortgaged premises, the mortgagor is in equity to look to the remainder of the mortgaged property still held by the debtor for satisfaction of his debt, as far as it will go, before following the property disposed of; yet, in case it be all sold or incumbered by him subsequently to the mortgage, then those taking under him, though taking at different dates, hold their several interests subject .

¹ *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Marshall v. Moore*, 36 Ill. 321; *Clowes v. Dickenson*, 5 Johns. Ch. 235. "That where tenants in common, mortgaged for a joint debt due from both, for the payment of which debt both were equally liable as between themselves, and afterwards made partition, and aliened their several shares in different parcels, the share of the premises set off to each was chargeable primarily with one-half of the debt and costs, and should be sold to raise that half in the inverse order of the alienation of the several portions thereof."—*Rathbone v. Clark*, 9 Paige, Ch. 648; *Meng v. Houser*, 13 Rich. Eq. R. 210.

² *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Conrad v. Harrison*, 3 Leigh, 576; *N. Y. Life Ins. Co. v. Milnor*, 1 Barb. Ch. 363; *Sibley v. Baker*, 23 Mich. 312, 315; *McKinney v. Miller*, 19 Mich. 142; *Cooper v. Bigly*, 13 Mich. 463, 474.

equally to the mortgage debt in proportion to the respective values of their several interests. In other words, that they are to contribute equally and not in the inverse order above referred to, and that their several interests are equally liable to the extent of their proportionate values, or in the whole, if necessary, for the mortgage debt.¹ The former ruling of liability in the inverse order of dates of purchase or incumbrance, seems to us the more correct and equitable, as not leaving the rights of subsequent purchasers and incumbrancers dependent on the subsequent conduct of the mortgage debtor as to selling the mortgaged estate.

§ 220. But the objection to a sale of lands for having been made out of this equitable order of liability comes too late in an application to set the sale aside, after confirmation thereof, and though a court of equity will not enforce such equitable order of sale, if timely application be made therefor, and proper ground for it exists, yet the objection founded on an alleged disregard thereof, is inadmissible, after the sale is perfected by confirmation and the execution of the deed,² and no equitable excuse is shown for the delay, if indeed anything short of fraud would avail to set the sale aside under such circumstances.

§ 221. Every community has power to declare the legal obligation of contracts being made within its jurisdiction, and may impose such conditions, restrictions, and exemptions, within constitutional limits, as may be most politic, as to all contracts made in the future. Hence mortgage sales are to conform to the laws in force at the date of the contract, so far as regards valuation and redemption laws.³

§ 222. The sale under a mortgage decree confers title only as against the parties to the suit. The proceeding can not be enforced to cut off subsisting equities of incumbrancers who have not had their day in court as parties to the proceedings resulting in the sale.⁴

§ 223. In case of a sale under representations that the property is clear of incumbrances, and it transpires that incumbrances actually exist, the proper course is for the court to

¹ *Bates v. Ruddick*, 3 Iowa, 423; *Massie v. Wilson*, 16 Iowa, 391; *Barney v. Myers*, 28 Iowa, 472.

² *Watt v. McGallard*, 67 Penn. St. 513.

³ *Bronson v. Kinzie*, 1 How. 311, 319, 321.

⁴ *Haines v. Beach*, 3 Johns. Ch. 459; *Davenport v. Turpin*, 41 Cal. 100.

order the incumbrances to be removed by so much of the proceeds of the sale as shall be necessary to effect the removal thereof, so as to make good to the purchaser an unencumbered estate, according to the terms of his purchase.¹

In *Brobst v. Brock*, the Supreme Court of the United States hold that an irregular, judicial sale, that is even void for want of notice as to the mortgagor, made at the instance of the mortgagee, passes to the purchaser all the rights of the mortgagee, although it may not bar the mortgagor's equity of redemption.

§ 224. The purchaser having paid the purchase money would seem to be subrogated to all the rights of the mortgagee as creditor, leaving the right to redeem still in the mortgagor.² The sale being made by procurement of the mortgagee he is estopped to deny its validity.

§ 225. And so if for other reasons the sale be set aside, and resale be made, and the money arising from the first sale has been paid over to the mortgage creditor, then equity subrogates the purchaser under the first sale, to the right to receive the purchase money of the second sale, instead of its being paid to the mortgage creditor, to the extent of the sum and interest so paid on the first sale by him.³

§ 226. So likewise as between sureties and other creditors of a mortgage debtor. The sureties have a right to be subrogated to all property or means furnished the creditor by the debtor, to secure the debt, and to have it applied thereon.⁴

§ 227. In Illinois the rule of priority as between a mortgage lien and lien of a mechanic, where the mortgage lien is the senior, is to ascertain the value of the premises at the time the mechanic's lien accrued, and the comparative value thereof as increased by the betterments made by the mechanic, and then in the decree of sale, give priority to the mortgage as to that proportion of the fund arising from the sale, which represents its comparative interest, and to the mechanic's lien priority as to the amount that represents the increased value caused by the improvements to the premises. The lien of the mechanic, so

¹ *Lawrence v. Cornell*, 4 Johns. Ch. 542.

² *Brobst v. Brock*, 10 Wall. 534; *Gilbert v. Cooley*, Walker, Ch. 494; *Jackson v. Cowen*, 7 Cow. 13.

³ *Johnson v. Robertson*, 34 Md. 165.

⁴ *Fielder v. Varner*, 45 Ala. 429, 436. (And if the creditor causes it to be applied otherwise, then the sureties are released, *pro tanto*.—*Ibid.*)

far as its priority is concerned, is commensurate only with the increased value of the property, and, in that respect, is not to be measured "by the cost of the material or labor actually furnished."¹

§ 228. In Kansas an unrecorded mortgage, or mortgage made and recorded for the wrong land by mistake, takes priority over the mere lien of a junior judgment on the lands really agreed to and intended to have been subjected to the mortgage. Such mortgage may be reformed and the lien of the judgment before sale on such judgment will be postponed to that of the mortgage.² And so does an unrecorded mortgage in Illinois over-reach a junior judgment lien with notice.³

§ 229. Under the Ohio Statute of 1831, a recorded junior mortgage takes precedence against an unrecorded senior mortgage; and so does an execution sale, under a judgment junior to an unrecorded mortgage. A purchaser at such execution sale, or at such junior mortgage sale, takes the superior title over the senior unrecorded mortgage, although the purchase be made with full knowledge of the existence of the unrecorded senior mortgage. Such unrecorded instrument in Ohio, though valid as between the parties when such validity does not affect the rights or interests of third persons, is, by the statute of February 22, 1831, void as to third parties until filed for record.⁴

§ 230. Where a mortgagor sells and conveys the mortgage premises with a stipulation in the deed that the vendee shall pay off the mortgage debt as a part of the purchase money to be paid for the premises, it is held under the statute of Missouri that the mortgagee can not, in a statutory foreclosure, extend the

¹ *Croskey v. N. W. M. Co.*, 48 Ill. 481. See also *Raymond v. Ewing*, 26 Ill. 843; *Smith v. Moore*, 26 Ill. 396; *North Pres. Church v. Jevne*, 32 Ill. 219.

² *Swarts v. Stees*, 2 Kansas, 236; *Gouverneur v. Titus*, 6 Paige, Ch. 347.

³ *Williams v. Tatnall*, 29 Ill. 553. But in Ohio the reverse is the rule, under the statute of 1831; see, Pt. 2, Chap. VII, title Priority; and *Fosdick v. Barr*, 3 Ohio St 471; and *Brown v. Kirkman*, 1 Ohio St. 116; *White v. Denman*, 1 Ohio, 110.

⁴ *Stansell v. Roberts*, 13 Ohio, 148, 156; *Fosdick v. Barr*, 3 Ohio St. 471; *Holliday v. Franklin Bank*, 16 Ohio, 533; *White v. Denman*, 16 Ohio, 59; *Jackson v. Lucc*, 14 Ohio, 514; *Mayham v. Coombs*, 14 Ohio, 428. Before the recording act of 1831, the recording of mortgages was placed on the same footing as absolute deeds; and notice of a mortgage, though unrecorded, operated to prevent priority of the subsequent judgment lien or junior mortgage. The ruling then was different. *Fosdick v. Barr*, above cited.

remedy so as to include the rendition of a judgment against the vendee for the amount so agreed by him to be paid. The Missouri statute is not comprehensive enough for such a proceeding; it provides for merely a foreclosure at law against the property and the original mortgage debtor. Any judgment rendered therein against the vendee personally, is not only void, but an execution sale and conveyance thereunder are also void, and may be so treated in a collateral proceeding.¹ If the mortgagee would, in one and the same suit, seek a remedy by foreclosure against the mortgagor, the property, and against the vendee as on his agreement to pay the purchase money, or part thereof, as the case may be, he must resort to the concurrent remedy of a foreclosure in chancery, making the vendee a party and seeking his remedy against both the land, the mortgagor, and his vendee.² The equitable powers of a chancery court, when once in possession of the case, and jurisdiction has attached by proper service, are sufficiently broad and searching to reach all the equities and all the rights and liabilities of all the parties, and will settle, dispose of, and enforce the whole in one suit.³

§ 231. In New York the practice is, on a bill in chancery, filed to obtain satisfaction of a mortgage, to decree not only as against the mortgagor for payment of the mortgage debt and sale of the land, but also for payment as against any other person who may have become surety for, or have assumed to pay the debt. This is done under the provisions of the New York statutes. This statutory foreclosure in New York is a proceeding in chancery, and in addition to the ordinary decree of foreclosure the court renders a personal judgment against the vendee of a mortgagor, upon the equitable undertaking that by virtue of his contract with the mortgagor, rests upon him to pay the amount, and which inures to the benefit of the mortgagee by subrogation, and which will thus be enforced to avoid circuity of action should the land not sell for the amount of the mortgage debt.⁴

¹ *Fithian v. Monks*, 43 Mo. 502; *Janney v. Spedden*, 38 Mo. 395; *Shaw v. Gregoire*, 41 Mo. 407.

² *Fithian v. Monks*, 43 Mo. 502.

³ *Fithian v. Monks*, 43 Mo. 502, 519, 520; *Klapworth v. Dressler*, 13 N. J. Eq. 62.

⁴ *Fithian v. Monks*, 43 Mo. 502; *Blyer v. Monholland*, 2 Sandf. Ch. 526; *King v. Whitely*, 10 Paige, 465; *Belmont v. Coman*, 23 N. Y. 438; *Burr v. Beers*, 24 N. Y. 178; *Curtis v. Tyler*, 9 Paige, 432; *Vail v. Foster*, 4 N. Y. 312.

§ 232. When the foreclosure is for interest only, or for one or more over-due installments of principal payable in installments, whilst others yet remain unmatured, the court will decree a sale of part, or of the whole of the mortgaged premises, at its discretion, as may seem most conducive to equity and the rights and interests of the parties, especially if the property can not be advantageously divided.¹ Or it may make a decree as for the whole debt, with an order to sell for the amount then due and retain the cause upon the docket with leave to take additional orders of sale of a part of the premises, from time to time, to satisfy other installments or interest, as the same become due.² If sale be made of the whole of the property, the court will see that the proceeds of the sale are so applied upon the several liabilities as will protect the rights and equities of the parties in interest.³ Therefore, in case of conflicting claimants to the surplus proceeds, or to any part thereof, the court will settle the rights of all such claimants after the surplus fund is brought into court, so as to protect the rights of all; and if not known to the court, then they should make known their rights before disposal of the proceeds and apply to have them settled and respected.⁴

§ 233. Where the mortgagor is not in law required to present his claim in probate against the estate of his deceased debtor, and to take his remedy and priority there, out of the funds arising from probate sale of the mortgaged estate, then a sale in probate by the administrator, to pay debts generally, under an order in probate to the proceedings for which the mortgagee is not made a party, the mortgage lien will retain its priority over the title of the purchaser at administrator's sale, and so will the title of a purchaser at mortgage sale subsequently made in foreclosure proceedings judicially had on such mortgage.⁵

§ 234. In the foreclosure of mortgages and sales thereon, in Iowa, when by decree of court the whole of the mortgaged land is sold to pay a first or a subsequent installment of the mortgage debt, without limitation or provision for future liability or sales,

¹ Brinkerhoff v. Thallhimer, 2 Johns. Ch. 486; Ellis v. Craig, 7 Johns. Ch. 7.

² Ibid.

³ Brown v. Stewart, 1 Md. Ch. 87; Astor v. Miller, 2 Paige, 68.

⁴ Snyder v. Stafford, 11 Paige, 71.

⁵ Howe v. McGivern, 25 Wis. 525.

the purchaser takes a clear title as against any liability to foreclosure and sale for subsequent installments.¹

§ 235. A decree on notice by publication only for the foreclosure of a mortgage against a defendant who is absent in the lines of an enemy of the government, is *void*. The court obtains no jurisdiction of the person or particular cause, and the defendant has no day in court.²

§ 236. A junior mortgagee may foreclose and sell the equity of redemption of the debtor in the mortgaged premises,³ and on such sale, although in Maine a return thereof is required by law from the officer, yet it is not essential to the validity of the sale that the officer selling specifically state in his return the hour, day, or particular place of sale; but it will be sufficient if it appear that notice was given of the sale, the length of time required by law — naming it — and that the debtor was notified by the officer of the time and place of sale. It is sufficient if the facts in that respect be substantially stated, but the particulars thereof are unnecessary.⁴

§ 237. The sale of a leasehold estate, under a decree of foreclosure of a mortgage executed by the lessee, vests the interest in the purchaser, subject to payment by him of subsequently accruing rent. He takes no better estate than the lessee had, and is in no better condition than that of the lessee, under the lease, although the foreclosure and sale be at the suit of the lessor as mortgagor of the leasehold interest.⁵

IV. VENDOR'S LIEN.

§ 238. The vendor's lien arises by implication of law. It attaches to the land sold for the unpaid purchase money, as against the vendee and all persons holding under him, with notice that purchase money remains unpaid. It is good as against the heirs or devisees of the vendee, or others, holding by voluntary

¹ Powesheik County *v.* Dennison, 36 Iowa, 244. See also Ritger *v.* Parker, 8 Cush. 145; Hobby *v.* Pemberton, Dudley, (Geo.) 212; Kelly *v.* Payne, 18 Ala. 371; Brown *v.* Tyler, 8 Gray, 135; Stark *v.* Mercer, 3 How. (Miss.) 377; Packer *v.* Rochester & S. R. R. Co., 17 N. Y. 287.

² Dean *v.* Nelson, 10 Wal. 158; Ludlow *v.* Ramsey, 11 Wal. 581. See also Dorsey *v.* Dorsey, 30 Md. 522.

³ Townsend *v.* Meader, 58 Maine, 288.

⁴ Ibid.

⁵ The People *v.* Dudley, 58 N. Y. 323; Catlin *v.* Grissler, 57 N. Y. 363.

conveyance, whether they have notice or not, for having paid no consideration, their equity is inferior to that of the original vendor. In fact, as against him, they have no equity at all.¹

§ 239. In cases of judicial foreclosure and sale, on mortgages given for the purchase money of real estate, the dower of the defendant's wife attaches only to the surplus proceeds of sale over and above the debt, interest and costs.²

§ 240. This lien can only be enforced in equity,³ and a sale in chancery to enforce a vendor's lien is a judicial sale.

§ 241. Such lien overrides a mechanic's lien where the debtor has only an executory contract of purchase. And so it will if the purchase is executed, provided the mechanic works with notice that the purchase money is unpaid.⁴ The court assert the preference of the vendor's lien in *Stoner v. Neff*,⁵ after reviewing former cases, in the following language:

"Now, although as decided in *Lyon v. McGuffey*, 4 Penn. St. 126, a mechanic's lien upon an equitable estate attaches to the subsequently acquired legal estate, which takes place by operation of law, yet it does not thereby take precedence of the vendor's claim." The court say: "The latter had an estate upon which the former had no lien, and when he transmitted it to his vendee he never let go his grasp upon his purchase money."

§ 242. If a vendor sell land by a contract merely executory and on a credit, retaining the legal title as security for the purchase money, and then takes judgment at law for the purchase

¹ 2 Story, Eq. Jur. Sec. 1217; 4 Kent, Com. 151; *Garson v. Green*, 1 Johns. Ch. 308; *Bayley v. Greenleaf*, 7 Wheat. 46, 50; *Watson v. Wells*, 5 Conn. 468; *Greenup v. Strong*, 1 Bibb, 590; *Hundley v. Lyons*, 5 Munf. 342; *Pierce v. Gates*, 7 Blackf. 162.

² *Thompson v. Lyman*, 28 Wis 266.

³ 2 Story, Eq. Jur. Sec. 1217; *Pierce v. Gates*, 7 Blackf. 162.

⁴ *Stoner v. Neff*, 50 Penn. St. 258.

⁵ 50 Penn. St. 261. We are aware that in *Lyon v. McGuffey*, 4 Penn. St. 126, it is held that the mechanic's lien has preference of the vendor's judgment for the purchase money; but the decision in that case is put upon the omission of the vendor to file his judgment as by law required within ten days after parting with his title, by which omission the vendor lost his priority. *Lyon v. McGuffey*, 4 Penn. St. 126, and *Stoner v. Neff*, 50 Penn. St. 258, 261. In Illinois, as we have seen, the court apportions the proceeds of sale, where the mortgage lien is the oldest, between the two, according to their respective equity, taking into consideration the increased value of the property occasioned by the betterments added thereto by the mechanic. *Ante*, Sec. 227, and *Croskey v. N. W. M. Co.*, 48 Ill. 481.

money, and executes and sells the land generally to satisfy the judgment, the purchaser, under the execution, takes the whole title, legal and equitable, to the land, leaving no interest therein whatever in either vendor or vendee, except the right of redemption in the judgment debtor, if there be a right to redeem.¹

§ 243. And if on such judgment the vendor cause to be executed and sold the equitable right only of the vendee or judgment debtor, then the sale will be valid to extinguish or transfer such right, and the purchaser will stand in the place of the vendee, if a third person, although there be no statute authorizing such proceedings.² And such purchaser, at execution sale, of a vendee's interest in lands, made *pendente lite*, a bill pending to enforce and sell under the vendor's lien, will be entitled to redeem from the vendor's lien before sale or from the decretal sale, if made, as the case may be, by paying off such lien and costs, and thereby perfect his title.³

§ 244. By statute, in Iowa, it is provided that "when part or all of the purchase money remains unpaid after the day fixed for payment, whether time is or is not of the essence of the contract, the vendor may file his petition asking the court to require the purchaser to perform his contract, or to foreclose and sell his interest in the property."⁴ And so may his assignee, if he assign the note given for the purchase money.

Thereupon the court may decree a rescission of the contract, or may, by decree of foreclosure, as in case of a mortgage, cause the premises to be sold for payment of the unpaid purchase money.

In case a note, or other security, is taken for such purchase money, the right to thus foreclose will follow the note into the hands of an assignee or indorser thereof, if so agreed by the vendor, or, without such agreement, by analogy to the equitable principle by which security for the payment of a debt passes with the debt to the assignee thereof.⁵

¹ Pittsburgh & Steubenville R. R. Co. v. Jones, 59 Penn. St. 433, 436, 437; Winston v. Affalter, 49 Mo. 263.

² Gaston v. White, 46 Mo. 486; Campbell v. Wooldridge, 6 Bush. 321.

³ Bush v. Williams, 6 Bush. 405.

⁴ Revision of 1873, Sec. 3329; Blair v. Marsh, 8 Iowa, 144; Pierson v. David, 1 Iowa, 34; Page v. Cole, 6 Iowa, 154; Hartman v. Clarke, 11 Iowa, 510.

⁵ Blair v. Marsh, 8 Iowa, 144, 147. In Adams v. Cowherd, 30 Mo. 458, the Supreme Court of Missouri assert the rule as follows: "The doctrine in those

Under the provision of the Iowa statute the vendor, where he retains title to the property sold, may file his petition on default of payment, tender a deed, and proceed for the two-fold purpose of a judgment *in personam* on the note or debt for the purchase money, and a decree of foreclosure declaring such judgment a lien on the land, and ordering it to be sold to satisfy the judgment and costs; and there will be no misjoinder of causes of action or remedies.¹

Such foreclosure as of a mortgage being provided for by statute, is of a mixed nature of law and equity; is not purely either a legal or a chancery remedy or procedure; but partakes of the nature of each. It is a union of the powers of both law and equity jurisdictions.²

§ 245. But the remedy of the vendor is not confined to the proceeding provided by the Iowa statute. He may proceed at law exclusively, taking a judgment *in personam* for the debt;³ or he may proceed by the mixed procedure and jurisdiction for a judgment *in personam* at law and a decree of foreclosure *in rem* against the land, with an order of sale of the same to pay the judgment;⁴ or he may, at his election, proceed purely under the statute for a foreclosure and sale of the land by a proceeding *in rem*, partaking partly of law and partly of chancery jurisdiction in its nature;⁵ or he may proceed by original bill in equity for a specific performance of the contract just as if no statutory provisions were ever enacted on the subject. These several remedies are concurrent and neither of them is exclusive. The statutory remedy being merely cumulative, does not extinguish the others.

§ 246. If the foreclosure of the vendor's lien be only for a part of the purchase money, other portions of which be not yet due, the rule, in Kentucky, is to decree a sale of enough of the land to pay the amount due and costs, the purchaser taking the

States, in which it is admitted to be law, that the assignee of a note given for the purchase money does not acquire by such assignment the lien which the vendor himself had, has no application in cases where the vendor retains the legal title. It is only applicable where the vendor makes a full conveyance which passes away absolutely his legal title. This seems to be well settled law. 1 Lead. Cas. Eq. 274, 275."

¹ Hartman *v.* Clarke, 11 Iowa, 510.

² Kramer *v.* Rebman, 9 Iowa, 114; Hartman *v.* Clarke, 11 Iowa, 510.

³ Hershey *v.* Hershey, 18 Iowa, 24.

⁴ Hartman *v.* Clarke, 11 Iowa, 510.

⁵ Hershey *v.* Hershey, 18 Iowa, 24; Kramer *v.* Rebman, 9 Iowa, 114.

same clear of the subsequently maturing portion of the debt and leaving a lien upon the residue of the land as security for such unmatured part of the debt.¹

An execution purchaser buying lands which are subject to a vendor's, or other lien, takes subject to the lien, but may remove the same by paying off the amount thereof.²

§ 247. A *bona fide* purchaser at execution sale will hold the land free of a vendor's lien of which there was no notice. This, too, in favor of the execution plaintiff himself, as purchaser, if without any notice of the lien he gives the credit to the execution debtor, as owner of the property, and the sale be for the debt so created. For, by placing the party in the position of apparent owner of the land, free of any lien, the vendor thereby enables him to obtain credit on the faith thereof, and will be bound by sales on liabilities thus allowed to be created.³

§ 248. As a mortgage for the purchase money of land, conveyed to one who afterward becomes a judgment debtor, overrides, in point of priority, the subsequent judgment, therefore an execution plaintiff who buys at sheriff's sale, in the enforcement of the judgment, having, in fact, parted with nothing, is not protected as a *bona fide* purchaser, but buys subject to the mortgage.⁴ The judgment creditor is no better off than would be a grantee of the debtor, who could only take the interest of the debtor subject to the mortgage.⁵

¹ *Emison v. Risque*, 9 Bush. 24; *Burton v. McKinney*, 6 Bush. 428.

² *Hinton v. Mitchell*, 1 Duvall, 382.

³ *Adams v. Buchanan*, 49 Mo. 64; *Bayley v. Greenleaf*, 7 Wheat. 46.

⁴ *Banning v. Edes*, 6 Minn. 402.

⁵ *Ibid.*

CHAPTER V.

JUDICIAL SALES OF LANDS IN PROBATE FOR PAYMENT OF DEBTS.

- I. WHAT LANDS MAY BE SOLD.
- II. WHAT DEBTS LANDS MAY BE SOLD TO PAY.
- III. WHO MAY CONDUCT THE SALE.
- IV. APPLICATION TO SELL—HOW AND WHEN TO BE MADE.
- V. WITHIN WHAT TIME, AND HOW THE SALE TO BE MADE AND PERFECTED.
- VI. NOT AFTER REPEAL OF THE LAW, OR ABOLITION OF THE COURT ALLOWING THE ORDER.
- VII. OF THE OATH OF THE PERSON SELLING, AND BOND.
- VIII. SALES MERELY IRREGULAR, OR IN IRREGULAR PROCEEDING, NOT VOID.
- IX. CONFIRMATION—THE DEED—ITS APPROVAL.
- X. POWER TO ENFORCE CONVEYANCE.
- XI. PURCHASER BUYING UNDER PROMISE TO HOLD FOR MINOR HEIRS BECOMES A TRUSTEE.
- XII. PRIORITY.

I. WHAT LANDS MAY BE SOLD.

§ 249. Sales in probate for payment of a decedent's debts can, as a general rule, only be made of those lands, or interests therein, whereof the debtor dies seized.¹

The law fixes the status of property, and renders it liable to sale or not, as may be enacted, for the payment of the owner's debts, whether such owner be living or dead; and if made liable, also regulates the method of subjecting it to sale. It follows, therefore, that in the absence of statute law rendering lands liable to sale in probate for the payment of debts, no such sales can be made,² and also follows that the law may allow sales in probate to be made of a decedent's property without notice to the heir, if it be

¹ *Torrance v. Torrance*, 53 Penn. St. 505, 511, 512; *Willard v. Nason*, 5 Mass. 240, 244; *Johnson v. Collins*, 12 Ala. 322; *George v. Williamson*, 26 Mo. 190; *McCandlish v. Keen*, 13 Gratt. 615.

² *Ticknor v. Harris*, 14 N. H. 272; *Drinkwater v. Drinkwater*, 4 Mass. 358; *Bergin v. McFarland*, 26 N. H. 536; *Moore v. The Widow*, 11 Humph. 512; *Pelletreau v. Smith*, 30 Barb. 494; *Washington v. McCaughan*, 34 Miss. 304; *Haynes v. Meeks*, 20 Cal. 288; *Pettit v. Pettit*, 32 Ala. 288; *Ikelheimer v. Chapman*, 32 Ala. 676.

so enacted, just as it may have caused the same property to be sold on execution during the debtor's lifetime, without first giving him notice of the levy or of the intended sale. In one case the property is in legal custody by the levy; in the other it is so by the death of the owner. There is no more reason why it should not be so in regard to the real property of a decedent, if such is the policy of the Government, than exists in regard to his personal effects. Both go to the heirs, if he dies intestate, and the debts are all paid; yet both are alike liable for his debts. True, in case of the personal property, the law vests a special ownership in the administrator; a trust for payment of debts; so in the other case a like trust devolves, as to the land, upon a probate court, and to be so applied in default of sufficient personality. Subject to this trust and these debts the heirs take it. The creditors had priority over the debtor as to a right to apply it, by law, to pay their debts, and so they have over the heirs. No new burden is imposed, and the law only vests in the heirs what is left after the debts are satisfied.¹

§ 250. Lands of a deceased debtor are in the custody of the law, and can only be sold in the manner authorized by statute; therefore, where, by law, a decedent's lands are not liable for sale on execution from a State court, they can not be sold on an execution from a Federal court. But the judgment creditor, who is plaintiff in the Federal court, must seek for payment of his judgment in the same manner required of those who are judgment creditors in the State court; and where, by law, such lands can only be sold in probate for payment of debts of a decedent, a judgment creditor selling on execution from a Federal court will not be permitted thereby to divert the property sold from the ordinary process of administration, and the sale will be void.²

§ 251. Thus, upon the death of a debtor, his whole available property, that is liable at all for debts, is a fund in the probate court, to be there administered and distributed to creditors and heirs or legatees, in accordance with the State laws;³ and judgments in

¹ Ante Sec. 57.

² *Yonley v. Lavender*, 21 Wall. 276; *Williams v. Benedict*, 8 How. 107; *Bank of Tennessee v. Horn*, 17 How. 160.

³ *Hornor v. Hanks*, 22 Ark. 572; *Williams v. Benedict*, 8 How. 112; *Hayne's Admr. v. Bessellieu*, 25 Ark. 499; *Yonley v. Lavender*, 21 Wall. 276; *Bank of Tennessee v. Horn*, 17 How. 160; *Bason v. Hughart*, 2 Tex. 479; *Chandler v. Burdett*, 20 Tex. 42; *McMiller v. Butler*, 20 Tex. 402.

the courts, either State or Federal, whether rendered before or after the death, are to be brought into probate for payment, according to grade and priority, out of the assets. A creditor, although a non-resident, can not, by suing in the National court or State court, against the administrator or executor, sell on execution and buy in the lands of such decedent for his debt, so as to make a valid sale. The officer's deed, in such case, is simply void, and equity will so declare it, as a fraud upon the law.¹ Until the debts of the deceased owner are paid, the heirs have no available estate; hence it is that where lands are thus liable in some of the States, the statute requires bonds to refund, if debts come against the lands, within a given time, to be executed by the distributees when lands are set off to them.²

§ 252. This principle is very fully illustrated in Missouri, where the statutes of administrations, as it is expressly held, entirely supersede the more cumbrous machinery of the common law in relation to estates of decedents, and vest the probate courts with the whole power of subjecting the estate of the decedent, both personal and real, to the payment of debts, to be administered in accordance with the statute.³ Consequently it is there held that for a mere deficiency of personal assets, a bill in equity does not lie at suit of a creditor of the ancestor against the heir, to subject lands inherited by the latter to the payment of his debt; but that the proceeding must be had in probate, and if omitted until after the final settlement of the estate, it can be had nowhere, not even in the court of general chancery jurisdiction. The power of the legislature over the whole subject of heirship and settlement of estates is omnipotent, and it may vary the common law rules, practice and remedies as to these subjects.⁴

§ 253. The probate court acts upon the title of the ancestor, subject to which action the heir takes title. "The administrator represents the land," and no notice is ordinarily necessary to validity of the sale in proceedings purely *in rem*.

§ 254. In Texas execution does not run against an administrator upon a judgment against him as such. The property of the deceased is in the custody of the law, and judgments must be

¹ *Hornor v. Hanks*, 22 Ark. 572; *Williams v. Benedict*, 8 How. 112.

² *Hayne's Admr. v. Bessellieu*, 25 Ark. 499.

³ *Titterington v. Hooker*, 58 Mo. 593.

⁴ *Pearce v. Calhoun*, 59 Mo. 271, 274.

probated and be settled in probate as other debts are settled; and if the creditor's claim carries with it any peculiar rights, they will there be respected.¹

§ 255. By the colonial acts of the assembly of Delaware, of 1693, 1697, and 1700, lands in that State were made assets in the hands of executors and administrators, and liable to be sold by them, for payment of their decedents' debts, without the intervention of the court. The practice then was, as the result of this authority of the executor or administrator, to appraise the lands, with the personal estate, and for the executor or administrator to account for the same.² This state of things continued until about the year 1720, and subsequent enactments restricted the exercise of the power of sale of lands by the executor or administrator, to cases in which an order or decree of the probate court, allowing such sales, was first obtained.³ Suit lay against executors and administrators on debts of their decedents, and judgments thus obtained were liens upon the decedent's lands.⁴ This too, as to such lien, although the lands were occupied by the heirs at law, for until the debts were paid "neither the devisee, or heir (say the court) can have any part of the real estate."⁵

Next in order came the act of 1728, subjecting all lands and tenements of the execution debtor, to sale on execution, provided sufficient personal property should not be found to satisfy the writ.⁶ By this act, which is believed to be still in force, and was so held in 1848, the sheriff making the sale, is to pay any excess of funds accruing on the sale, to the execution defendant, and if he be dead, then to the executor or administrator. Thus the surplus is treated as personal estate. For on insufficiency of personality the law converts the realty into personality, to pay the same. Upon a proper showing, however, that all the debts are paid, the court will order the payment of any surplus above contemplated, to be made to the devisee or heir.⁷

¹ *Bason v. Hughart*, 2 Texas, 479; *Chandler v. Burdett*, 20 Texas, 42; *McMiller v. Butler*, 20 Texas, 402.

² *Vincent v. Platt*, 5 Har. (Del.) 164, 168; Vol. 1 Laws of Del.—Appendix 20, 24, 26.

³ *Vincent v. Platt*, 5 Har. (Del.) 164, 168.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.* and p. 170.

§ 256. A sale of lands in probate, in Delaware, to pay the debts of a decedent, carries to the purchaser all the title which the deceased had, in the lands, equitable as well as legal, at the time of his death, when the sale is duly confirmed.¹

§ 257. In probate sales, the interest of the deceased and no more is sold; the widow's dower can not thereby be divested, if capable of being set off by metes and bounds.²

If not capable of being set off by metes and bounds, as for instance, where the property is indivisible, then equitable dower is to be assigned to the widow of the proceeds.³

§ 258. In Texas it has been held that headright certificates for land are such an interest in real estate as may be sold by the administrator under an order in probate for payment of a decedent's debts.⁴

§ 259. In Alabama, it is held that lands purchased from the United States in the name of the widow and heirs of a decedent, and with the moneys of the estate, under a pre-emption right which had enured to the decedent in his life-time as a settler on the public lands, are not liable to sale in probate for payment of the decedent's debts. Nor can the investment be treated in a court of equity as a trust so as to enable the creditors to follow the fund and subject the lands in a court of equity. The pre-emption right descends, under the act of Congress, to the widow and heirs and not to the creditors or to the administrator. The court, GOLDTHWAITE, Justice, say, that "such a trust would be directly against the policy of the pre-emption acts, as the bounty of the government was obviously intended for the settler and his heirs. A construction, therefore, which would make him or them trustees for the person advancing the purchase money, is not to be tolerated, as it would, in effect, transfer the bounty of the government from the settler to the lender of the money."⁵

In the case above referred to from Alabama, the court were disposed to regard the investment of the moneys of the estate as a payment to the widow and heirs, and, therefore, as not calculated to create a trust were the question ruled under the pre-

¹ Caulk *v.* Caulk, 3 Houston, (Del.) 81.

² Snodgrass *v.* Clark, 44 Ala. 198; Barney *v.* Frownier, 9 Ala. 901; Snedicor *v.* Mobley, 47 Ala. 517.

³ Owen *v.* Slatter, 26 Ala. 547.

⁴ Soye *v.* Maverick, 18 Texas, 100.

⁵ Johnson *v.* Collins, 12 Ala. 322, 337; Cothran *v.* McCoy, 33 Ala. 65.

emption laws out of the way. If regarded as a payment, then, however liable to refund for payment of debts, such payment would not create a lien on the lands in which the moneys were invested, but would create only a personal liability for the amount. If, however, the moneys of the estate be diverted from their ordinary course by the administrator and be vested in realty by him, it seems that in whosesoever name it may be, that creditors and heirs would alike be able, on ordinary principles of equity, to treat the investment as a trust for their benefit or for either, as the necessities of the case should require. And such seems to be the doctrine in Tennessee, where the ruling is contrary, to some extent, to that in Alabama. The heirs in Tennessee are regarded as holding lands in trust for the payment of debts of a decedent, where moneys of the estate are invested in lands in their name and will be so considered to the extent of the debts, as far as the property will go toward payment of the same, if there be no other fund for payment thereof. But in such cases the jurisdiction is in the ordinary court of general chancery jurisdiction and not in the court of probate.¹ In the case of *Moore v. The Widow*, the Supreme Court of Tennessee say: "By our law all the real estate of a deceased debtor, whether of a legal or equitable character, is liable to satisfaction of his just debts, subject to the widow's right of dower, which has preference over the rights of creditors. 11 Humph. 512." In Alabama, if, at his death, the decedent is seized of an inchoate title (other than a government pre-emption) to lands, such interest may be sold in probate for payment of debts.²

§ 260. In Massachusetts the jurisdiction of the probate court is, by statute, extended so as to enable it to subject to sale for payment of debts, lands fraudulently conveyed away by the debtor in his lifetime.³ But this is contrary to the general rule in the several States. Prior to this statute the contrary seems to have been the law in Massachusetts.⁴

¹ *Moore v. The Widow*, 11 Humph. 512. In *Parchman v. Charlton*, 1 Cold. it is held that to subject such equity the creditor, if other assets are exhausted, should go into a court of equity. 381.

² *Vaughan v. Holmes*, 22 Ala. 593; *Perkins v. Winters*, 7 Ala. 855; *Duval v. P. and M. Bank*, 10 Ala. 636; *Duval v. McLoskey*, 1 Ala. 708; *Jennings v. Jenkins*, 9 Ala. 285.

³ *Norton v. Norton*, 5 Cush. 524

⁴ *Bancroft v. Andrews*. 6 Cush. 493.

§ 261. In *Vaughan v. Holmes*,¹ the Supreme Court of Alabama say that if the question was before them for the first time they should be disposed to hold that the probate court could not, under the authority given it for the sale of lands, direct the sale of an inchoate equity like the one then under consideration; but that the rule was too firmly established to allow a departure therefrom.

Thus it is settled in Alabama that equitable interest or title to lands, or inchoate interest therein of any kind, may be sold in probate for payment of debts, on application and proper showing of the administrator, and that the purchaser will take the title of the decedent, whatever it may be, and will in that respect stand in lieu of the heirs.²

§ 262. And so, in Missouri, may equities of redemption in real property, from mortgage liens, be sold in probate for the payment of debts. Mortgaged property itself may, by decree in probate, be sold to pay, and the proceeds be applied to pay the mortgage debt, without leaving the mortgagee to his proceeding to foreclose; and when so sold in probate and the proceeds applied to extinguish the mortgage lien or liens, the surplus fund, if any, becomes assets and enters into the general fund of the estate.³ Nor is the mortgage creditor compelled to look to his lien for payment of his debt. He has a right to come into probate for a distribution of the fund in court arising from sales of lands of the deceased, or arising from other sources, and if the same land so subject to the mortgage, or deed of trust lien, be sold in probate, and the sale be made subject to the deed of trust or mortgage, and the administrator pay the lien debt out of the funds arising from such sales, yet the lien is not discharged and the estate becomes entitled to payment of the same from the purchaser of the land by a species of equitable right nearly akin to the doctrine of subrogation, for the purchaser is subjected to no greater hardship by being compelled to refund to the estate what it pays in discharge of the lien than he would be if left to discharge it himself by payment to the lien creditor.⁴

§ 263. In Alabama, whether the sale be of real or personal

¹ 22 Ala. 593.

² *Evans v. Matthews*, 8 Ala. 99.

³ *Jackson v. Magruder*, 51 Mo. 55.

⁴ *Welton v. Hull*, 50 Mo. 296.

property, to enable the administrator to legally sell an order of court is necessary. The application therefor is to be such as will effect jurisdiction, and is by petition stating jurisdictional facts and cause for the decree.¹ If jurisdiction has attached, then an appeal is the only remedy for errors and irregularities;² and after sale and conveyance, the sale is no longer questionable, by motion to set aside, no matter what the cause. It can not be done collaterally or on mere motion.³ If merely *voidable*, it must be attacked by direct proceeding.⁴

§ 264. The lands of a decedent are assets, in Florida, in the hands of the administrator, but title is in the heirs, subject to payment of debts.⁵

So in Georgia; but the heirs may recover as against strangers, and the administrator may recover as against the heirs, under the statute, for application, when necessary to payment of debts.⁶ This recovery may be without *first* having an order of sale.

There should be a particular description of the lands to be sold in the decree allowing the administrator.

§ 265. The power to subject lands of a decedent for payment of debts, conferred on the courts, is held to be remedial, and applicable "as well in relation to estates where the decedent had died before as after its enactment."⁷

§ 266. In *McDonald v. Aten*,⁸ it is said that, "Upon the death of a debtor, his estate, of whatever description, stands for the payment of all his general creditors alike." The executor or administrator is a trustee for the creditors and for the lien, to administer and apply the proceeds under the order and as the instrument of the court; and the order of sale can ordinarily only be made on his application. The contrary, we have seen, is the rule as to application in Texas. The order, when made,

¹ Alabama Conference of M. E. Church *v.* Price, 42 Ala. 39, 49, 50; McCollum *v.* McCollum, 33 Ala. 711; Winston *v.* Jones, 6 Ala. 550; Hine *v.* Hussey, 45 Ala. 496; Wilson *v.* Armstrong, 42 Ala. 168.

² Collins *v.* Johnson, 45 Ala. 548.

³ Ibid.

⁴ Ward *v.* Oates, 42 Ala. 225.

⁵ Union Bank *v.* Powell's Heirs, 3 Fla. 176.

⁶ Carruthers *v.* Bailey, 3 Geo. 105; McDade *v.* Burch, 7 Geo. 559; Stell *v.* Glass, 1 Geo. 486.

⁷ Fitzhugh *v.* Fitzhugh, 6 B. Mon. 4.

⁸ 1 Ohio St. 297; Sheldon *v.* Newton, 3 Ohio St. 494; Lane *v.* Thompson, 43 N. H. 320.

operates not on the persons of the heirs, but on the paramount title of the ancestor on which the debts operated as an implied lien.¹

§ 267. But sales in probate may not be made of a decedent's lands to pay debts which are not presented within the time allowed by statute for presentation of claims.²

The administrator or executor must interpose the statute in such case in bar of claims, and may not waive it.³

And though it has been held that he is not bound to plead the general statute of limitations in bar of debts presented for allowance, and that sales of lands may be made to pay debts so subject to be barred, yet in some cases it is held that anyone or more of the heirs may interpose the general statute to bar claims and prevent sales of their patrimonial lands.⁴

II. WHAT DEBTS LANDS OF A DECEDENT MAY BE SOLD TO PAY.

§ 268. As sales of land under the statute to pay a decedent's debts can only be made in probate, as a general rule, of land whereof he died seized, so, by a like rule, the lands of a decedent can only be sold to pay such debts as he owed at the time of his death, and was legally liable to pay.⁵

In other words, they can not be sold to pay costs or expenses of the administration or liabilities created or incurred by the administrator. Such a sale would be illegal and void.⁶

¹ Sheldon *v.* Newton, 3 Ohio St. 494; Grignon's Lessee *v.* Astor, 2 How. 319; Beauregard *v.* New Orleans, 18 How. 502.

² Hodgdon *v.* White, 11 N. H. 208; Nowell *v.* Nowell, 8 Greenl. 220; Fitch *v.* Witbeck, 2 Barb. Ch. 161; Mooers *v.* White, 6 Johns. Ch. 360; Brown *v.* Porter, 7 Humph. 373.

³ Brown *v.* Porter, 7 Humph. 373; Hodgdon *v.* White, 11 N. H. 208.

⁴ Mooers *v.* White, 6 Johns. Ch. 360, 389; Riser *v.* Snoddy, 7 Ind. 442; Bond *v.* Smith, 2 Ala. 660.

⁵ Torrance *v.* Torrance, 53 Penn. St. 505, 511, 512; Dubois *v.* McLean, 4 McLean, 486, 489; Carnan *v.* Turner, 6 Har. and J. 65; Baker *v.* Kingsland, 10 Paige Ch. 366; Farrar *v.* Dean, 24 Mo. 16.

⁶ Dubois *v.* McLean, 4 McLean, 486, 489; Sumner *v.* Williams, 8 Mass. 199, 200; Farrar *v.* Dean, 24 Mo. 16; Wood *v.* Byington, 2 Barb. Ch. 387; Fitch *v.* Witbeck, 2 Barb. Ch. 161; Carnan *v.* Turner, 6 Har. and J. 65. In Farrar *v.* Dean, the Supreme Court of Missouri, in the delivery of their opinion, held the following language: "The administrator has no power over the real estate, except so far as to hold it for the payment of the debts of the deceased, and when there are no debts the land descends to the heirs or escheats to the State; and it is not in the power of the administrator to hinder this legally;

§ 269. Nor to pay costs of suit recovered against the administrator or estate, nor other cost not incurred by deceased during his lifetime.¹ But if a valid sale be made for the *bona fide* purposes of paying debts, and there remains of the proceeds a surplus fund, then this remnant may be applied to pay costs, charges and expenses of administration, or of litigation, under discretion of the court.²

§ 270. In *Dubois v. McLean*,³ the court illustrate the principle of the text in the following terms: "Again, the only debt shown to support the sale in 1828 was one of two hundred and fifty-seven dollars, contracted by the executors in August, 1824. * * * * The land was sold, not for a debt of Dubois, but for a debt contracted by the executors. * * It is no answer that this debt was contracted by the executors in due course of administration, and for the benefit of the estate."

§ 271. So far as the estate is concerned, this supposed debt was not a debt, but only a liability, as costs, arising incidentally in the course of administration, and whether rightfully or wrongfully incurred, was not one for which, under the ordinary statutes, real estate may be sold.

§ 272. In the language of the court, in *Carnan v. Turner*,⁴ to subject lands of a decedent for payment of debt, by an order of sale in probate, "the claimants must prove themselves creditors of the deceased ancestor."

§ 273. The debt must be as is held in *Wood v. Byington*,⁵

nor can the probate court direct or order a sale of real estate for the costs accrued after the administration begins, and only because it did begin. Such costs are not debts due by the deceased, nor debts at the time of the death of the intestate." * * * * And again, in the delivery of the same opinion: "It is beyond doubt that the debts to be paid by the sale of the real estate of a deceased person, were debts and liabilities of that person only—debts due or to become due by him. No one ever imagined that the Legislature designed to place the power in the hands of the administrator to create the debt, and then to sell the real estate of the decedent to pay for it. When there are no debts there is no law to sell the real estate. The administrator can not procure, in such a case, an order for its sale without a violation of law." * * * * "We must hold such sales invalid."

¹ Sandford *v.* Granger, 12 Barb. 392; Farrar *v.* Dean, 24 Missouri, 16; Wood *v.* Byington, 2 Barb. Ch. 387; Carey *v.* Dennis, 13 Md. 1.

² Drinkwater *v.* Drinkwater, 4 Mass. 358, 359.

³ 4 McLean, 489.

⁴ 6 Har. and J., 65, 67.

⁵ 2 Barb. Ch. 387.

a "debt due from the testator." And in the more recent case of *Sanford v. Granger*,¹ it is held that *Wood v. Byington* is authority for saying "that the costs awarded against executors can in no event be a charge on real estate in the hands of the heir."

§ 274. But although when sold for a proper pre-existing debt of the decedent, costs may be paid out of any excess, yet such excess, if not so required, or applied by the court, is properly considered as partaking of the character of real estate, from which it has been raised, and in the distribution, of any remaining portion thereof will go to those to whom the real estate would have belonged had the same not been sold.²

§ 275. In some of the States, however, the law is different as for what the sale may be made. In California, the purposes for which sales of lands of a decedent may be ordered and made in probate is expressly extended in the statute to "debts, expenses and charges of administration," as well as the usual purpose of paying the outstanding debts of the deceased.³

§ 276. The individual lands of a decedent can not be sold to pay a copartnership debt until after the individual debts of the decedent are all satisfied and the copartnership assets are exhausted.⁴ The individual creditors have a right to be first paid out of the individual assets; and copartnership creditors have the same preference as to the copartnership assets. When the latter are all exhausted, then if the copartnership debts be not all paid, the creditors of the copartnership may pursue the individual property of the deceased member or members of the copartnership, may cause their claims to be allowed in probate, and in default of personal assets the administrator may obtain a license or decree for sale of lands to pay the same; but not until the individual debts of the decedent are all provided for.⁵

§ 277. If there be no debts of the decedent existing, and of vital force, which can be enforced against the estate, as, for instance, if the debts be barred by the statute, the probate court

¹ 12 Barb. 392, 403.

² *Griswold v. Frink*, 22 Ohio St. 79; *Quinby v. Walker*, 14 Ohio St. 193.

³ In the matter of Bentz's Estate, 36 Cal. 687, 690.

⁴ *Moline Man. Co. v. Webster*, 26 Ill. 233, 239.

⁵ *Pahlman v. Graves*, 26 Ill. 405; 1 Story Eq. Jur. Sec. 675; 3 Kent Com. 58; *Wilder v. Keeler*, 3 Paige, 167; Story, Part. Sec. 363; *McCulloh v. Dashiell*, 1 *Harris & Gill*, 96; *Moline Man. Co. v. Webster*, 26 Ill. 239.

has not jurisdiction to order or license the sale of the real estate; and if, in the absence of vital debts, a sale and conveyance be thus illegally decreed and made, the sale is void as against those entitled to inherit the property under the law as heirs of the deceased.¹ Thus, where no steps are taken by creditors within the time limited by statute for so doing, to fix the liability of an administrator or executor to answer for demands against the estate, the liens of such debts cease as against the property, and can not be enforced under a license to sell.²

§ 278. And so a license to sell the lands of a decedent, or order of sale granted to one of several administrators or executors of the estate, upon application of such one alone, is invalid. It must be upon the application of, and in behalf of all.³

III. WHO MAY CONDUCT THE SALE.

§ 279. Under the common law lands were not sold by proceedings in probate for payment of debts.⁴

§ 280. Under the enactments of the several American States, in which such sales are made, they are conducted and made under the supervision and approbation of the court by the executor or administrator; and in nearly all cases on his application. A stranger, the sheriff as such officer, or other person, can not, in probate be authorized to sell. Their sale would be void.⁵ And so of a special administrator.⁶

In *Long v. Burnett*,⁷ the Supreme Court of Iowa, LOWE, Justice, in treating of the powers of a special administrator, in refer-

¹ *Tarbell v. Parker*, 106 Mass. 347; *Aiken v. Morse*, 104 Mass. 277; *Heath v. Wells*, 5 Pick. 139; *Lamson v. Schutt*, 4 Allen, 359. Nor is any different doctrine to be inferred from the cases of *Richmond, Petitioner*, 2 Pick. 569; or *Palmer v. Palmer*, 13 Gray, 326. In these cases, though the license to sell was granted after the period expired within which actions against the administrator could be commenced, the sale was to pay debts upon which the statute of limitations did not operate.

² *Tarbell v. Parker*, 106 Mass. 347; *Aiken v. Morse*, 104 Mass. 277; *Scott v. Hancock*, 13 Mass. 164; *Lamson v. Schutt*, 4 Allen, 359, 360, 361; *Heath v. Wells*. 5 Pick. 140; *Hudson v. Hulbert*, 15 Pick. 423.

³ *Hannum v. Day*, 105 Mass. 33.

⁴ *Bergin v. McFarland*, 26 N. H. 536.

⁵ *Crouch v. Eveleth*, 12 Mass. 503; *Swan v. Wheeler*, 4 Day, 137; *Jarvis v. Russick*, 12 Mo. 63; *Long v. Burnett*, 13 Iowa, 28.

⁶ *Long v. Burnett*, 13 Iowa, 28.

⁷ *Ibid.*

ence to sales of land in probate, say: "His functions are limited to a few described duties in relation to the preservation of the personal assets, and these cease as soon as a regular administrator is appointed. He can not be sued. The statute of limitations does not run against the creditors of the estate during the period of his agency. He is simply an agent, and not an administrator. He has no power to settle the estate; much less power to sell land for any purpose. It was no more competent for the judge of probate to grant him license to sell land than that of any third person. His act in doing so was extra judicial and void. The judge's power over real estate of deceased persons is derived through the medium of regular administration. This was wanting in the case before us. Hence the jurisdiction did not, as it could not, under the circumstances, attach." The court then lay down the rule in that case, that for such want of a regular administrator, and of jurisdictional power in the probate court making the order of sale, such sale should be treated as void in a collateral proceeding. That "the power to grant a license to sell real estate to pay debts does not arise till a petition, as the law directs, is presented by a legal administrator." That "when such a petition is presented, jurisdiction over that particular subject is acquired, and the subsequent proceedings, although those of a court of inferior and limited powers, will be presumed as regular and conclusive as those of courts of general jurisdiction, and shall not be collaterally assailed."

§ 281. A sale of lands in probate, based on a special act of the legislature authorizing such order and sales, is to be made by the administrator, and when made will be held to have been made by him in his capacity of administrator, and not as a commissioner of the courts.¹

§ 282. But although no one but the administrator or executor may be authorized by order in probate to sell, yet, *quære*, if any one or more of several executors or administrators of an estate may not be empowered by such order to sell instead of their whole number.²

¹ Corbell *v.* Zeluff, 12 Gratt. 226, 235.

² Jackson *v.* Robinson, 4 Wend. 437; Wortman *v.* Skinner, 1 Beasley Eq. 358.

IV. APPLICATION TO SELL — HOW, AND IN WHAT TIME TO BE MADE.

§ 283. As no one but the executor or administrator can, under the statute, as a general rule, be authorized in probate to sell the lands of a decedent for payment of debts,¹ so it follows, as a general rule, that the application for the order to sell is to be made by the executor or administrator, whichever there be.

§ 284. But to this rule there are some exceptions. In Texas an heir, legatee, or creditor must join in the application under the act of February 25, 1843. Prior to the passage of that act the administrator alone might apply.²

But a special administrator, who continues to act as administrator *proper*, and as such settles up the same, is, in respect thereto, *administrator de facto*, and may apply for and obtain license to sell land of his intestate, and the sale, if made, and if otherwise unobjectionable, will be valid.³

It is held that where there are several administrators or executors of an estate any one or more of them may apply, and may be authorized by the court of probate to sell.⁴

In Iowa the term administrator is by statute made to apply alike to executors and administrators.⁵

§ 285. The application of the administrator or executor for an order of sale of lands to pay debts must be a timely one,⁶ and the court are the judges in all cases of the reasonableness of the time, when no time is fixed by law.⁷

In some cases, one year from the grant of administration has been adjudged a suitable time within which to apply.⁸

¹ Crouch *v.* Eveleth, 12 Mass. 503; Swan *v.* Wheeler, 4 Day, 137; Jarvis *v.* Russick, 12 Mo. 63; Florentine *v.* Barton, 2 Wall. 210, 216; Long *v.* Burnett, 13 Iowa, 28; Palmer *v.* Palmer, 13 Gray, 326.

² Miller *v.* Miller, 10 Texas, 319.

³ Read *v.* Howe, 39 Iowa, 553, 560.

⁴ Jackson *v.* Robinson, 4 Wend. 437. But see to the contrary, Gregory *v.* McPherson, 13 Cal. 562; Wortman *v.* Skinner, 1 Beasley Eq. 358.

⁵ Revision of 1860, Sec. 2333.

⁶ Mooers *v.* White, 6 Johns. Ch. 376; Ricard *v.* Williams, 7 Wheat. 59, 113; Smith *v.* Dutton, 16 Mo. 308; Langworthy *v.* Baker, 23 Ill. 484; McCrary *v.* Tasker, 41 Iowa, 255.

⁷ Mooers *v.* White, 6 Johns. Ch. 376; Jackson *v.* Robinson, 4 Wend. 437, 442.

⁸ Mooers *v.* White, 6 Johns. Ch. 376, 377.

But we apprehend that there are cases in which one year would not be a reasonable time. Much depends upon the time allowed for presenting and proving up debts, and for settling the estate. The court are to judge, if there be no time limited, taking all circumstances into consideration.

In *Palmer v. Palmer*¹ four years is held not to be an unreasonable time in which to make the application to sell.

§ 286. Orders of sale made after an unreasonable length of time from the grant of administration, and sales made thereon, are held to be absolutely void.²

§ 287. But when an earlier application is precluded by reason of the property being a homestead, and as such exempt from sale for debts, and the administrator renews the application within a reasonable time after the property ceases to be homestead and so exempt, then the objection as to time will not prevail, there being cause unavoidable for the delay.³

§ 288. And while the Supreme Court of Illinois, in a still more recent decision than *Langworthy v. Baker*, *supra*, recognize the fact that there is no statute in that State barring actions or applications for sale of a decedent's lands for payment of his debts, by any specific limit of time, they also reassert the former rulings of that court, that such applications must be made in a reasonable time; that seven years will amount to a bar; and that fourteen years, the time involved in the case then under consideration, is a most unreasonable delay, and precludes the possibility of any decree of sale. Each case, they say, must rest on its own particular merits.⁴

§ 289. In *Hyde v. Tanner*,⁵ it is held that three years, under the statute, is the time limited in which to pass the title by a sale of lands in probate, as against a *bona fide* purchaser from the heirs, and that after that time the land is discharged from the statutory lien, and that the functions of the probate court over the same then cease.

¹ 13 Gray, 326.

² *Langworthy v. Baker*, 23 Ill. 484.

³ *Bursten v. Goodspeed*, 60 Ill. 277; *Wolf v. Ogden*, 66 Ill. 224, 226.

⁴ *Wolf v. Ogden*, 66 Ill. 224. See, also, *McCoy v. Morrow*, 18 Ill. 519; *Rosenthal v. Renick*, 44 Ill. 203; *Moore v. Ellsworth*, 51 Ill. 308; *Bursten v. Goodspeed*, 60 Ill. 277.

⁵ 1 Barb. 75; *Fitch v. Witbeck*, 2 Barb. Ch. 161; *Ferguson v. Broome*, 1 Bradf. 10.

§ 290. The application should be accompanied with a show of diligence on the part of the administrator in first administering and exhausting the personality.¹

§ 291. If one order of sale prove insufficient, as to the sum raised, another order or orders may be made, as may be necessary, from time to time.² The debts should first be allowed of record; but if omitted the entry may be made *nunc pro tunc*.³

§ 292. The application must be by petition, identifying the lands intended to be sold, and setting forth whatever under the statute is required to give the court jurisdiction of the particular case and subject matter thereof, which should be so set forth as to be good upon demurrer.⁴

§ 293. The action of the court or decree, the notice of sale, and the sale itself, must all conform to the same subject matter or land described in the petition as the land sought to be sold. No title will pass if the petition be in reference to one tract of land, and the decree, sale, or notice of sale, be in reference to another and different one.⁵ The petition should also show the death of the decedent;⁶ that the land sought to be sold was

¹ Ibid.

² *Farrington v. King*, 1 Bradf. 182.

³ Ibid.; 191, 192.

⁴ *Grignon's Lessee v. Astor*, 2 How. 319; *Beauregard v. New Orleans* 18 How. 497; *Alabama Conference v. Price*, 42 Ala. 39; *Cooper v. Sunderland*, 3 Iowa, 114; *Moore v. Neil*, 39 Ill. 256; *Frazier v. Steenrod*, 3 Iowa, 339; *Long v. Burnett*, 13 Iowa, 28; *Sheldon v. Newton*, 3 Ohio St. 495; *Cates v. Loftus*, 4 T. B. Mon. 444; *Gerrard v. Johnson*, 12 Ind. 636; *Morris v. Hogle*, 37 Ill. 150; *Morrow v. Weed*, 4 Iowa, 77; *Florentine v. Barton*, 2 Wall. 210, 216; *Gregory v. McPherson*, 13 Cal. 562, 570; *Finch v. Edmondson*, 9 Tex. 504.

⁵ *Frazier v. Steenrod*, 7 Iowa, 340; *Weed v. Edmonds*, 4 Ind. 468; *Williams v. Childress*, 25 Miss. 78. In *Schnell v. Chicago*, 38 Ill. 382, there is a ruling seemingly to the contrary, but in that case the land sold was the same as the description in the petition, whereas the order of sale was that the land described in the petition be sold, naming it by a wrong number. And if application be made and exhausted by a decree and sale of real estate to pay the then known debts of a decedent, and afterwards other debts appear against the estate requiring a further sale for their payment, then there must be a new application for such additional decree and sale, substantially as if none before had ever been made. *Gilchrist's Admr. v. Rea*, 9 Paige Ch. 66. But a general description broad enough to cover all the lands of a descent is sufficient to authorize the sale of any of such lands situated within the jurisdiction of the court making the order. *Monk v. Horne*, 38 Miss. 100.

⁶ *Comstock v. Crawford*, 3 Wall. 396, 403; *Florentine v. Barton*, 2 Wall. 210, 216; *Griffith v. Frazier*, 8 Cranch, 9, 23. In Illinois it should give also the names of the heirs. *Turney v. Turney*, 24 Ill. 625.

owned by him at his decease;¹ should show the state of the personal assets, and the insufficiency thereof to pay the debts;² and all such other matters, if any, that by local statute may be required. It must likewise be sworn to as may by statute be required.³ It is not necessary, as a general rule, to specify the several debts, yet a statement of the aggregate amount is required.⁴

§ 294. In Tennessee, a report showing the state of the assets is first to be made and affirmed by the court as a basis for the application.⁵

§ 295. In Alabama, the application must show jurisdiction or contain what in law confers it; that there is an administrator of the estate, who is the applicant; that the deceased died seized of the lands sought to be sold; that the lands lie within the territorial jurisdiction of the court; that there are valid debts of the decedent unpaid and which the estate is liable for; that the personality of the estate is insufficient to meet the same, or is exhausted; and that the will, if there be one, of the deceased does not confer power on the administrator or executor to sell the lands. This confers on the court full jurisdiction.⁶

§ 296. In Georgia, the probate decree should show a particular description of the lands to be sold (and indeed, this is the general doctrine).⁷

Yet, it is held that a decree or order for sale of *all* the real estate of a decedent is valid.⁸

¹ Willard *v.* Nason, 5 Mass. 240; McCandlish *v.* Keen, 13 Gratt. 615; Johnson *v.* Collins, 12 Ala. 322; George *v.* Williamson, 26 Mo. 190, 193; Drinkwater *v.* Drinkwater, 4 Mass. 354; Hathaway *v.* Valentine, 14 Mass. 500; Griffith *v.* Frazier, 8 Cranch. 23.

² Van Nostrand *v.* Wright, Hill & D. (N. Y.) 260; Small *v.* Cromwell, Ibid. 154; Cralle *v.* Meem, 8 Gratt. 496; Gregory *v.* McPherson, 13 Cal. 562; Crippen *v.* Crippen, 1 Head, 128.

³ Cooper *v.* Sunderland, 3 Iowa, 114, 137, 138; Babbitt *v.* Doe, 4 Ind. 355; Thornton *v.* Mulquinne, 12 Iowa, 549, 554; Parker *v.* Nichols, 7 Pick. 111, 116; Campbell *v.* Knight, 26 Maine, 224; Little *v.* Sinnett, 7 Iowa, 324; Morrow *v.* Weed, 4 Iowa, 77.

⁴ Collins *v.* Farnsworth, 8 Blackf. 575.

⁵ Frazier *v.* Pankey, 1 Swan, 75.

⁶ Satcher *v.* Satcher, 41 Ala. 26; Spragins *v.* Taylor, 48 Ala. 520; Revised Code of Ala. Secs. 2080, 2081, 2082. But notice to the heirs of the time and place of hearing the application must be given. Ibid. and Williams *v.* Williams, 49 Ala. 439.

⁷ Bond *v.* Watson, 20 Geo. 135.

⁸ Clements *v.* Henderson, 4 Geo. 148.

The administrator must conform strictly to the order of sale, else no title passes. Such is the rule in Georgia. There must be an order of sale, preceded by four months' notice of application for it; the sale must be at public auction, and at the time and place required by the statute; and such notice of time and place of sale must be given as the statute prescribes. All these must be shown, as well as the deed, to sustain the sale.¹

§ 297. If, however, the deed, by proper recitals, shows these things subsequent to the decree, such showing is *prima facie* evidence of the truth thereof; but is open to contrary evidence. The decree, however, if nothing appears against it, is evidence of the existence and performance of all the pre-requisites to the making thereof. These are considered as adjudicated in making the decree.² The strictness of the rule is somewhat relaxed, it is said, as to *bona fide* or innocent purchasers.³

The court of ordinary, in Georgia, is of original jurisdiction as to decedent's estates, and the jurisdictional facts are inferred.⁴ But the rule *caveat emptor* applies to all judicial sales in Georgia as elsewhere.⁵ There is no warranty. If the person conveying warrants the title, then the warranty binds only himself. There is no such thing as binding the estate or heirs by the warranty, or the owner of property, in any judicial sale.⁶

§ 298. So, in New Jersey, the application and decree for sale of lands in probate to pay debts of a decedent, must designate the lands to be sold; a general order to sell the lands will not do.⁷ Also, the application should show the personal effects to have been fully applied.⁸ The case here cited was on error, and the decision does not reach the point as to what the effect of such irregularities would be on the validity of the sale, if one had been made. If the administrator advances money and pays off

¹ Clements *v.* Henderson, 4 Geo. 148.

² Clements *v.* Henderson, 4 Geo. 148; Grier *v.* McLendon, 7 Geo. 362; Davie *v.* McDaniel, 47 Geo. 195; Stell *v.* Glass, 1 Geo. 486; Tucker *v.* Harris, 13 Geo. 1.

³ Worthy *v.* Johnson, 8 Geo. 244.

⁴ Davie *v.* McDaniel, 47 Geo. 200.

⁵ Worthy *v.* Johnson, 8 Geo. 236.

⁶ Ibid.; Ramsey *v.* Blalock, 32 Geo. 376.

⁷ State *v.* Conover, 9 N. J. 338; Pittinger's Admr. *v.* Pittinger, 3 N. J. Eq. 156. (But such irregularity must be taken advantage of on error or appeal, and will not avail as a defense, collaterally, if all else is fair. Ibid.)

⁸ State *v.* Conover, 9 N. J. 338.

the debts in good faith, though such proceeding is irregular, yet the court, at its discretion, may order and make sale of realty, to reimburse him when no assets remain.¹

But if, as one of the heirs, the administrator has sold his share of the lands, then, in the sale to reimburse his advancement, his interest in the lands should not be sold, but he should be reimbursed a less amount in proportion, for his being the hand to pay and hand to receive, there is no need of sale as to his share, he having already paid his part.²

§ 299. In Virginia, by statute, in proceedings for sale of an infant's lands, all those persons are required to be made parties who would become his heirs or distributors, in case of his death occurring at that time.³

§ 300. In Missouri, notice of application for order of sale is necessary, and no petition therefor, or exhibit of accounts, lists, or inventories is required to enable the court of probate to order a sale of lands to pay debts, when such order is made under the 47th Sec. of the Administration Law, and at a regular term of the court, and at the time of the annual settlement of the accounts of the administrator or executor. The statute provides, substantially, that at such settlement an order of sale of real estate may be made, if, upon settlement of accounts, it appears that there is a deficiency of personal estate to pay debts and legacies; and as the same statute fixes the term of court and the time of *settlement*, no notice is necessary; for all persons interested are bound to know the law which at such settlement empowers the court to order the sale of lands above stated; and being so chargeable with notice of a possible order of sale, they have it in their power to attend and ward off the same, if a proper showing can be made to that effect.⁴

§ 301. But where the order of sale is to be made upon application of the administrator, executor, or a creditor under the 25th Sec. of the same act, then notice becomes necessary, and upon the filing by the applicant of a petition, with the accounts, lists and inventories required by the statute as requisite to place before the court the proper information as to a deficiency of per-

¹ Liddell *v.* McVickar, 11 N. J. 44.

² Ibid. (There is, then, no need to sell his part to reimburse himself, but the claim for which the resale is made is that portion less.)

³ Knotts *v.* Stearns, 1 Otto, 638.

⁴ Patee *v.* Mowry, 59 Mo. 161; 1 Wagner's Mo. Statutes, p. 100, Sec. 47.

sonal assets the law requires the court to make, and order that persons interested in the estate be notified thereof, and that unless the contrary thereof be shown on the first day of the next term, an order of sale will be made of the whole, or of so much of the real estate as will pay the debts of the deceased. This notice is to be published four weeks in some newspaper in the county where the proceedings are had, or by ten handbills, to be put up in the public places in such county at least twenty days before the term of court at the discretion of the court. This having been done, jurisdiction is conferred, and upon proof thereof the court may hear testimony, examine the parties on oath, and grant or deny the order of sale, as may be proper.¹ This latter proceeding, under the 25th Sec. of the Administration Law, may be had at any time, and need not be at a regular term of court.²

§ 302. The report and confirmation or approval of a sale of lands under an order in probate, where several tracts are sold to different persons, and a report thereof is made as one report, and so approved, will not render invalid the sale of one tract or tracts to one or more persons, because a sale of another portion of the lands is improperly made to a different person; for such sale and report may be affirmed or approved in part, and rejected in part by the court. Therefore a sale is not rendered void as to part properly sold by reason of the improper sale and report of the residue. Thus, where the judge of the court ordering the sale and approving the same, when reported for approval, was the purchaser of one of the tracts of land sold, the sale and approval thereof as to the other tracts is not thereby avoided.³

§ 303. An order of sale in probate, without notice, is *invalid*, and so is sale thereon where notice is by law *necessary* to the *validity* of such order and sale; and the fact that the widow, as *guardian* of the minor heirs, waived in writing notice of the proceedings to such minors, does not render the order and sale binding as against her right of dower, and she is not thereby estopped from claiming and enforcing the same.⁴

And when notice is necessary to be shown in proceedings to sell lands in probate for payment of debts of a decedent, such

¹ *Patee v. Mowry*, 59 Mo. 161; Wagner's Mo. Statutes, p. 96, Sec. 25. (The *sale*, however, in either case, is to be conducted in the same manner. *Supra*.)

² *Patee v. Mowry*, 59 Mo. 161.

³ *Bacon v. Morrison*, 57 Mo. 68.

⁴ *Helens v. Love*, 41 Ind. 210.

showing may not be made in other manner than by the records. Proof thereof *aliunde* is not admissible.¹ In Mississippi it must appear by the record that notice was found by the court to have been given, when proof thereof is essential to validity of the sales, and in the absence thereof the sale is void, under the ruling in that State.²

§ 304. Sales of land in probate, in Indiana, by executors and administrators are made subject to all incumbrances. If otherwise, it is when so ordered by the court.³ If the court order the incumbrances to be paid out of the proceeds of sale, then the money, or enough thereof for that purpose, is to be first so applied by the executor or administrator, under direction of the court.⁴ But when the sale is made subject to existing liens or incumbrances, then these are to be paid by the purchaser himself, and it becomes his duty so to do.⁵

Such sales of land, in probate, may be made, in Indiana, under the statute, by an executor, when one has been appointed without the State and there is no executor in the State, and the testator was not a resident of Indiana at the time of his death.⁶

To effect a sale the foreign executor must file an authenticated copy of his appointment in the court of common pleas of the county where the real estate lies.⁷ After so doing he may be authorized, by order of said court, to pay debts or legacies in the manner and on the terms applicable to executors appointed in the State. All proceedings for such sale must be had in the court wherein such authenticated copy of the appointment is

¹ Root *v.* McFerrin, 37 Miss. 17; Campbell *v.* Brown, 7 Miss. 234; Gwin *v.* McCarroll, 9 Miss. 351; Enos *v.* Smith, 15 Miss. 85; Ridley *v.* Ridley, 24 Miss. 648; Williams *v.* Childress, 25 Miss. 78; Lee *v.* Bennett, 31 Miss. 119; Hardy *v.* Gholson, 26 Miss. 72.

² Cases above cited.

³ Martin *v.* Beasley, 49 Ind. 280, (1875.) (In such sales the purchaser takes the land subject to unpaid taxes. *Ibid.*)

⁴ *Ibid.*; Foltz *v.* Peters, 16 Ind. 244; Clarke *v.* Henshaw, 30 Ind. 144.

⁵ Cases above cited.

⁶ Rapp *v.* Matthias, 35 Ind. 332. (But the real estate is only liable to sale to pay debts of a decedent, in Indiana, when there is a deficit of personal assets, and this, too, whether the application is by a domestic or foreign executor or administrator. Newcomer *v.* Wallace, 30 Ind. 216, 218.)

⁷ Rapp *v.* Matthias, 35 Ind. 332, 338, 339. (The previous ruling, in said State, that no such filing was necessary to enable foreign executors to sue, was under a different statute. *Ibid.*)

filed, and such court has *exclusive* jurisdiction to direct sale of all lands situated in any county of said State of Indiana.¹

If it be made to appear to said court that such foreign executor is bound with sufficient sureties in the State and county wherein he was appointed, to account for the proceeds of such sale or sales, and a copy of the bond so binding him, duly authenticated, be filed in the court, then no further bond shall be required.

If, however, it is not so made to appear that the executor is thus sufficiently bound where he was appointed, then he must give bond in the court where the order of sale is asked for in the same manner as is required by executors under like circumstances who are appointed in the State.²

In other respects the proceedings by such foreign executor's application for an order of sale, are to be as in like applications by local or domestic executors.³ That is, the petition must show the amount of personal property, if any, of the deceased which has come into the executor's hands; the amount of outstanding debts against the estate and the insufficiency of the personal assets to pay the same; the description of the real estate liable to sale to be made assets; and, also, the names and ages of the heirs at law, legatees or devisees of the deceased; and if the petition be by a foreign executor, that the authenticated copy of the executor's appointment is filed in court, as herein before shown to be necessary.⁴

§ 305. In Connecticut, it is ruled that it must appear on the face of the order of sales that the debts and charges are greater than the value of the personal effects, or else the order for selling the real estate is invalid.⁵ Hence an order is without authority and invalid which predicates the making thereof on the alleged fact of insufficiency of the personality to pay the debts and legacies.⁶

§ 306. The proper or sufficient allegation in the petition, in Illinois, in reference to want of assets to pay debts, is not, as held in *Bree v. Bree*, 51 Ill. 367, or that, if there were assets,

¹ Rapp *v. Matthias*, 35 Ind. 332, 338.

² Ibid.

³ Ibid.

⁴ Ibid. and p. 339.

⁵ Wattles *v. Hyde*, 9 Conn. 9.

⁶ Ibid.

that then an account thereof had been made, but the allegation should be that there are debts standing against the estate which have been allowed to the amount, etc., and that there are no assets in petitioner's hands, the personal property being all exhausted, wherewith to pay said debts without selling the real estate, or that the personal estate of, etc., has been all sold and applied on the payment of the debts of the estate and has been duly accounted for by petitioner.¹

§ 307. In Minnesota, the statement of the debts required to be made as preceding the application of the administrator or executor, for a license or decree to sell real estate, may be made in the aggregate; it is held that the debts need not be particularized or stated in detail.² Such is the settled practice, and construction of the statute in that State, and a different requirement now might result seriously in disturbing rights acquired during such construction.³

§ 308. It is not sufficient ground for order of sale of real estate to pay a decedent's debts, that the personal assets have been distributed among the heirs; in such case they must be required to refund by enforcement of the distribution bonds.⁴

If the amount distributed be regained and applied, and still prove insufficient, resort may then be had to the sale of the realty, if the administration of the whole personal fund has been faithfully accounted for;⁵ and if it has not, the administrator is liable on his bonds for the waste, and must be pursued.⁶ But if the deficiency in the personal effects has occurred, without blame or fault of the administrator, then he will not be held accountable for the consequences, and the real estate may be sold under order in probate, to be made in like manner as if there had been a deficiency of personality in the first instance: As for instance where a portion of the personal estate consisted of slaves, which were lost to the estate during the process or course of administration by reason of their manumission by the government as a war measure.⁷

¹ *Moffitt v. Moffitt*, 69 Ill. 646, 647; *Stow v. Kimball*, 28 Ill. 93.

² *The State ex rel. Pendegrast v. The Probate Court*, 19 Minn. 117.

³ *Ibid.*

⁴ *Foley v. McDonald*, 46 Miss. 238. ⁵ *Ibid.*

⁶ *Ibid.*; *Evans v. Fisher*, 40 Miss. 643.

⁷ *Stigler v. Porter*, 42 Miss. 449; *Webster v. Parker*, 42 Miss. 465; *Evans v. Fisher*, 40 Miss. 643.

§ 309. If the estate is declared insolvent, the administrator may uncover fraudulent conveyances, if any, made by decedent in his lifetime and subject the property thus conveyed, to payment of debts.¹

§ 310. As lands of a decedent can, as we have seen, be sold in probate for the payment of debts, only when there is a deficiency of moneys, or personality, to pay the same,² it is therefore error to decree a sale of realty, if the deficiency of moneys or personality be merely temporarily caused by a stay law, which alike prevents the collection of debts due to and from the decedent's estate.³

§ 311. Nor will a mere deficiency of personal assets, to pay debts, after final settlement of the estate authorize proceedings in equity in a chancery court of general equity jurisdiction, against the heirs, to subject to sale, for payment of debts, lands descended to them from the decedent, where, unlike as at common law, the whole jurisdiction and power over the estates of decedents is vested by statute in the courts of probate. The proceedings for sale should, in such cases, under such probate jurisdiction, originate in the probate court on the application of the administrator, executor, or a creditor of the estate,⁴ if no accident has intervened to prevent such relief in probate as in the case above cited from 52 Ill. of *Clark v. Hogle*.

§ 312. In Mississippi, the personal estate must first be found insufficient to pay the debts; and this fact is required to be found by the verdict of a jury, before any order for the sale of a decedent's lands can be made.⁵ And if the personality be wasted by the administrator, by reason of which the personal assets are insufficient to pay the debts, it does not follow that there is to be a sale of the realty for that purpose; but the remedy, in such case, is against the administrator and his sureties on their bond. The heirs may set up such waste, and thereby prevent an order of sale.⁶

§ 313. Some of the cases vest the jurisdiction in an application by the administrator to sell a decedent's lands on a proper

¹ *Forniquet v. Forstall*, 34 Miss. 87.

² *Supra*, and see also *Foster v. Crenshaw's Exrs.*, 3 Munf. 514.

³ *Elliott v. George*, 23 Gratt. 780.

⁴ *Titterington, Admr. v. Hooker*, 58 Mo. 593.

⁵ *Turner v. Ellis*, 24 Miss. 173, 179, 180.

⁶ *Ibid.*; *Paine v. Pendleton*, 32 Miss. 820.

petition alone;¹ others on notice and petition.² In either case, when jurisdiction has attached, the decree is regarded as an adjudication of all previous questions, both as to jurisdiction and merits, and as shutting out all subsequent inquiry into the same, or as to their sufficiency, except on an appeal.³ In all cases the power of the court to decree and sell is the creature of the statute, and its requirements must be conformed to; such conformity, however, is presumed to have existed after decree, where jurisdiction has attached.

§ 314. In a probate proceeding *in rem*, by an administrator or executor for the sale of a decedent's lands to pay debts, if no notice is required by the statute, then none need be given; such proceeding is the creature of the statute;⁴ and it is sufficient if the statute be conformed to. If notice be left to the discretion of the court, then a reasonable notice will be necessary, to avoid reversal on error.

§ 315. If notice or other thing be by the statute or local practice required, and the statute or local decisions declare the decree or sale *invalid* if conformity to such requirements does not in the record appear to have existed, then such conformity

¹ Grignon's Lessee *v.* Astor, 2 How. 338; Beauregard *v.* New Orleans, 18 How. 497, 502, 503; George *v.* Watson, 19 Texas, 354, 370; M'Pherson *v.* Cunliff, 11 Sergt. & R. 422; Alexander *v.* Maverick, 18 Texas, 179; Spencer *v.* Shehan, 19 Minn. 338; Montour *v.* Purdy, 11 Minn. 384.

² Morrow *v.* Weed, 4 Iowa, 77; Davenport Loan Assoc. *v.* Schmidt, 15 Iowa 213; Frazier *v.* Steenrod, 7 Iowa, 339; Myer *v.* McDougal, 47 Ill. 278; Moore *v.* Neil, 39 Ill. 256; Morris *v.* Hogle, 37 Ill. 150; Hawkins *v.* Hawkins, 28 Ind. 66; Stow *v.* Kimball, 28 Ill. 108; Doe d. Platter *v.* Anderson, 5 Ind. 33; Winston *v.* McLendon, 43 Miss. 254. (If the heir be an infant, the legal guardian is also to be made defendant, and in such case no *guardian ad litem* is necessary but the infant defendant, and so adults, if any, must be sued with notice. *Ibid.*) But the notice need not name the heirs by name under the statute in Illinois. Stow *v.* Kimball, *supra*. So much of Turney *v.* Turney, 24 Ill. 625, as rules differently is disavowed.

³ Grignon's Lessee *v.* Astor, 2 How. 319; Morrow *v.* Weed, 4 Iowa, 77, 87; Sheldon *v.* Newton, 3 Ohio St. 495; Simpson *v.* Hart, 1 Johns. Ch. 91; Beauregard *v.* New Orleans, 18 How. 502; Carter *v.* Waugh, 42 Ala. 452; Paul *v.* Hussey, 35 Maine, 97; Comstock *v.* Crawford, 3 Wall. 396. And if there be on file a defective or insufficient notice, purporting to be the one given, yet where the decree states that "notice according to law was given of the pendency of the cause," it will be intended that such was the case, and that other proof was received thereof by the court. Moore *v.* Neil, 39 Ill. 256; Moffitt *v.* Moffitt, 69 Ill. 641; Stow *v.* Kimball, 28 Ill. 93.

⁴ Bergin *v.* McFarland, 26 N. H. 536; Clark *v.* Thompson, 47 Ill. 25, 28; Florentine *v.* Barton, 2 Wall. 210, 216.

must appear from the record, in order to support the sale.¹ But if such statute be only *directory*, then, although notice is necessary to avoid error on an appeal, yet it is not absolutely essential to the validity of the decree and sale, when they are questioned in a collateral proceeding. The presumption of law is, after decree and sale, that the statute was conformed to; and the proceedings are binding, if the jurisdiction of the court had attached over the particular case, by a petition good upon demurrer.² Nor does it follow that the proceedings are not binding, where the statute is but directory, even if it appear that notice is wanting; for though the omission may be error, yet if not reversed, or set aside, the decree is binding, even if it appear from the record that such notice had not been given; for the power of the court is over the property sought to be affected by the order or decree, when the case is *in rem*, "without regard to the parties who may have an interest in it. All the world are parties." By the decree and sale, "the estate passes by operation of law." The court lays hold of, and passes the title, by a right paramount to that of the heirs. It does this under the same authority that confers the heirship: The authority of the legislature, which has full power to control the property of decedents.³

Such seems to be the settled rule of decision in the Supreme Court of the United States, in the absence of a positive statute declaring sales void if notice be required, and it does not from the record appear to have been given; and such we conceive to be the more correct doctrine. The same power that confers heirship may postpone it, and hold the property first liable for the decedent's debts, and as a consequence may confer the power to so apply it on the probate court without notice to the intended

¹ Guy *v.* Pierson, 21 Ind. 18; Gelstrop *v.* Moore, 26 Miss. 206; Cooper *v.* Sunderland, 3 Iowa, 114, 137, 138; Thornton *v.* Mulquinne, 12 Iowa, 549, 554; Babbit *v.* Doe, 4 Ind. 355.

² Morrow *v.* Weed, 4 Iowa, 77; Sheldon *v.* Newton, 3 Ohio St. 495; Reeves *v.* Townsend, 22 N. J. 296; Wilson *v.* Wilson, 18 Ala. 176; Clark *v.* Blacker, 1 Ind. 215; Paul *v.* Hussey, 35 Maine, 97; Fox *v.* Hoyt, 12 Conn. 491; Raymond *v.* Bell, 18 Conn. 81; Wight *v.* Warner, 1 Mich. 384; Grignon's Lessee *v.* Astor, 2 How. 319; M'Pherson *v.* Cunliff, 11 Sergt. & R. 422; Clarke *v.* Holmes, 1 Mich. 390; Elliott *v.* Peirsol, 1 Pet. 328; Thompson *v.* Tolmie, 2 Pet. 157; Voorhees *v.* The Bank of U. S. 10 Pet. 473; Wright *v.* Marsh, 2 G. Greene, 111; Florentine *v.* Barton, 2 Wall. 210, 216; George *v.* Watson, 19 Texas, 354.

³ Florentine *v.* Barton, 2 Wall. 210.

heir, whose right attaches to the residue and not to the estate generally, in its unadministered condition. True, the legal title descends to the heir at once, as it can not be in abeyance; but so descends, subject to a prior lien in law for the ancestor's debts — a lien which the power that creates both it and the heirship may enforce in its own way. The probate court acts upon the title of the ancestor, subject to which action the heir takes title. "The administrator represents the land,"¹ and no notice is ordinarily necessary to the validity of the sale in proceedings *in rem*.

¹ Moore *v.* Stark, 1 Ohio St. 369; Grignon's Lessee *v.* Astor, 2 How. 319; Beauregard *v.* N. Orleans, 18 How. 497; Wilkinson *v.* Leland, 2 Pet. 657; Satcher *v.* Satcher's Admr., 41 Ala. 26; Sheldon *v.* Newton, 3 Ohio St. 494; M'Pherson *v.* Cunliff, 11 Sergt. & R. 432; Perkins *v.* Fairfield, 11 Mass. 227; Saltonstall *v.* Riley, 28 Ala. 164; Paine *v.* Mooreland, 15 Ohio, 442; Robb *v.* Irwin, 15 Ohio, 698; Benson *v.* Cilley, 8 Ohio St. 614; Borden *v.* The State, 11 Ark. 519; Tongue *v.* Morton, 6 Har. & J. 23; Rice *v.* Parkman, 16 Mass. 328; Sohier *v.* Mass. Genl. Hos., 3 Cush. 487; Ludlow's Heirs *v.* Johnston, 3 Ohio, 560; Adams *v.* Jeffries, 12 Ohio 253; Voorhees *v.* Bank of U. S., 10 Pet. 473; United States *v.* Arredondo, 13 Pet. 88; Rhode Island *v.* Mass., 12 Pet. 718; Stow *v.* Kimball, 28 Ill. 93; Florentine *v.* Barton, 2 Wall. 210, 216; Lane *v.* Thompson, 43 N. H. 320. In Sheldon *v.* Newton, above cited, the Supreme Court of Ohio review the subject of such sales, and of judicial sales generally, with great ability, and say: "1. A settled axiom of the law furnishes the governing principle by which these proceedings are to be tested. If the court had jurisdiction of the subject matter and the parties, it is altogether immaterial how grossly irregular or manifestly erroneous its proceedings may have been; its final order can not be regarded as a nullity, and can not, therefore, be collaterally impeached. On the other hand, if it proceed without jurisdiction, it is equally unimportant how technically correct and precisely certain, in point of form, its record may appear; its judgment is void to every intent and for every purpose, and must be so declared by every court in which it is presented. In the one case the court is invested with the power to determine the rights of the parties, and no irregularity or error in the execution of the power can prevent the judgment, while it stands unreversed, from disposing of such rights as fall within the legitimate scope of its adjudication; while in the other its authority is wholly usurped, and its judgments and orders the exercise of arbitrary power under the forms, but without the sanction of law. The power to hear and determine a cause is jurisdiction; and it is *coram judice* whenever a case is presented which brings this power into action. But before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal to answer the charge therein contained. When these appear, the jurisdiction has attached; the right to hear and determine is perfect; and the decision of every question thereafter arising is but the

§ 316. This question of notice and personal jurisdiction in probate sales came before the Iowa Supreme Court in *Good v. Norley*, at December term, 1869. Good filed a petition in chancery in the district court of Polk County to quiet title to a tract

exercise of the jurisdiction thus conferred; and whether determined rightfully or wrongfully, correctly or erroneously, is alike immaterial to the validity, force and effect of the final judgment, when brought collaterally in question. *United States v. Arredondo*, 6 Pet. 709; *Rhode Island v. Mass.*, 12 Pet. 718. We wholly dissent from the position taken in argument, that the jurisdiction of the court, or the effect of its final order, can be made to depend upon the records disclosing such a state of facts, to have been shown in evidence, as to warrant the exercise of its authority. To adopt the language of the court, in answer to the same position, in *Voorhees v. The U. S. Bank*, 10 Pet. 473: 'We can not hesitate in giving a distinct and unqualified negative to this proposition, both on principle and authority, too well and long settled to be questioned.' It was distinctly repudiated in the early case of *Ludlow's Heirs v. Johnston*, 3 Ohio, 560; and has been no less positively denied in every subsequent case, including *Adams v. Jeffries*, 12 O. R. 253. The tribunal in which these proceedings were had was a court of record of general common law and chancery jurisdiction; and while it is true, that in the exercise of this particular authority, it may be regarded as a tribunal of special and limited powers prescribed by statute, it is still to be remembered that it was the tribunal created by the constitution, with the exclusive jurisdiction over probate and testamentary matters, and had no one singular characteristic of those inferior courts and commissions to which the rule insisted upon has been applied by the English and American courts. All its proceedings are recorded and constitute records in the highest sense of the term, imparting absolute verity, not to be impaired by averment or proof to the contrary, and conclusively binding the parties, and all who stand in privity with them. The distinction is not between courts of general and those of limited jurisdiction, but between courts of record that are so constituted as to be competent to decide on their own jurisdiction, and to exercise it to a final judgment without setting forth the facts and evidence on which it is rendered, and whose records, when made, import absolute verity; and those of an inferior grade, whose decisions are not of themselves evidence, and whose judgments can be looked through for the facts and evidence which are necessary to sustain them. *McCormick v. Sullivant*, 10 Wheat. 199; *Griswold v. Sedgwick*, 1 Wend. 131; *Baldwin v. Hale*, 17 J. R. 272; *Grignon's Lessee v. Astor*, 2 How. 341; 2 Bin. R. 255; 4 Ibid. 187. Orphans' courts and courts of probate, when constituted courts of record, have uniformly been held of the former description. *Thompson v. Tolmie*, 2 Pet. 165; *Grignon's Lessee v. Astor*, supra; 11 Sergt. & Rawle, 429; 11 Mass. 227. In respect to them, when it appears that they have proceeded with jurisdiction over the subject matter and the parties, we fully agree with the Supreme Court of Pennsylvania in saying: 'If the purchaser was responsible for their mistakes in point of fact, after they had adjudicated upon the facts, and acted upon them, those sales would be snares for honest men;' and with the Supreme Court of the United States, in affirming that the reasons upon which their decisions have rested 'are founded on the

of land, claiming that in 1852 it was purchased at a sale thereof in probate, for payment of debts, made under order in probate by the administrator of John Norley, deceased. That a deed therefor was duly executed and by the court approved; but that

oldest and most sacred principles of the common law. They are rules of property, on which the repose of the country depends; titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral actions, or none can know what is his own; and there are no judicial sales around which greater security ought to be placed than those made of the estates of decedents, by order of those courts to whom the laws of the States confide full jurisdiction over the subjects.' The purchaser is bound to look no further back than the order of the court, made in a proceeding which the law has empowered it to entertain, and with the proper parties or subject matter before it. All else we are bound to presume in favor of its action; and neither in judgment of law, nor in fact, is it to be treated with the least distrust. The proper application of this principle disposes of all the exceptions taken to these proceedings arising after the jurisdiction of the court should have attached. * * * * As it is not denied that the court was invested with power to entertain the proceeding, and as the lands were situated within the limits of its jurisdiction, it only remains to consider whether notice to the heirs was indispensable to the jurisdiction of the court; and if so, whether such notice was substantially given. These questions can only be answered in the light of a proper construction of the act of February 11, 1824. (2 Ch. Stat. 1308,) under which these proceedings were had. From a very early period in our history, lands have been made assets, in the hands of executors and administrators, for the payment of debts; but at no time could they be converted into money for this purpose until the personal property was exhausted, nor without the special leave of the proper court of probate. Prior to the passage of the act of 1824, the leave was obtained upon the petition of the personal representative, showing a deficiency of personal assets. No parties defendant were required to be made, and the proceeding throughout was wholly *ex parte*, and strictly and technically *in rem*. That act effected no further change than to require 'the person having the next estate of inheritance of the testator or intestate,' to be made defendant to the petition. What effect did this have upon the proceeding? Did it make it an adversary proceeding *in personam* in such sense as to make actual notice to the heir indispensable to the jurisdiction of the court? These questions have not been answered in any of the cases that have been decided, and they are not of easy solution. As the interests of the owner of the property sought to be appropriated are involved in either form of proceeding, neither is supposed to be pursued without notice to him. Proceedings *in rem* have their own essential and distinguishing characteristics. They are usually brought to enforce some liability which the thing itself has incurred, the law treating the thing itself as the debtor or delinquent, or some specific lien upon it. The seizure of the thing and taking it from the possession of the owner, and into the custody of the law, is deemed to be implied notice to him, and while the proceedings were confined to the pursuit of personal property, was often quite as effectual as actual notice by the service of a summons would have

the same was lost before recording. In the proceeding in proceeding in probate, under which the sale occurred, the administrator made the widow (whose dower had already been assigned) and the infant heir, the only child of the decedent, defendants,

been. Other means for giving notice were usually prescribed, but a failure to comply with them only goes to the regularity of the proceeding, and has never been held necessary to give the court jurisdiction. When the property charged with the liability is taken into the custody of the law, and brought within the power of the tribunal, and the judgment spends its whole force upon the property, creating no personal liability upon the owner, it has never been doubted that a judgment of condemnation was effectual to vest a perfect title in the purchaser, however irregularly or erroneously the court may have proceeded. But when the liability is not upon the thing, and it is seized only to secure and satisfy such judgment as may be recovered against the owner, there is much difficulty in seeing how the proceeding can be said to be *in rem*, or how a judgment *in personam* can be rendered until the party has been personally brought into court by such notice as the law may have provided. I do not doubt that the validity of judgments strictly *in rem* may, by positive provision of law, be made to depend upon the service of process or other notice upon the owner; but in the absence of such expressed legislative intention, the omission to serve the process or give the notice makes the proceeding only erroneous, but not void. The thing itself being in the custody of the law and within the power of the court, is subject to its action and effectually disposed of by its judgment. The proceeding authorized by the act of 1824, tested by its nature and essential qualities, would seem to be clearly enough a proceeding *in rem*. Upon the death of the owner the law charged his debts as a specific lien on all his property, real and personal, and held it subject to their payment. The legal title to the real estate, it is true, descended to the heir, but it descended to him subject to this paramount lien. The executor or administrator was a trustee alike for creditors and heir, and the order of sale upon his petition operated on the estate and not on the heir; and the purchaser, by operation of law, took the paramount title of the ancestor and did not claim through or under the heir. 2 How. 338; 11 Sergt. & Rawle, 430. The heir was required to be made a party to the proceeding with a view to his having notice; but it is nowhere intimated that a failure to give the notice should deprive the court of jurisdiction over the property. I am, therefore, strongly inclined to the opinion that such an omission goes only to the regularity of the proceeding and not to the jurisdiction of the court; and that its final order can only be set aside for irregularity or reversed on error, and can not be treated as a nullity in a collateral action. The proceeding was distinctly declared to be *in rem* in the case of Robb v. Irwin's Lessee, 15 O. R. 698, and, although READ, J., in his dissenting opinion, characterizes it as a 'nickname,' in the case of Paine's Lessee v. Mooreland, 15 O. R. 435, decided at the same term, he not only concurred with the court, but delivered their opinion in holding proceedings in attachment to be *in rem* in which jurisdiction was acquired by the seizure of property, and that a judgment rendered without notice could not be treated as a nullity, although such proceedings are founded upon no liability or lien, resting upon the

and asked for the appointment of a guardian *ad litem* for the infant. A guardian *ad litem* was appointed. The guardian appeared in person, and the widow by an attorney, and severally waived notice and filed answer, consenting to the sale of the prop-

erty itself; have adversary parties and are consummated by a judgment *in personam*, and the statute expressly declaring that the suit shall be dismissed at the cost of the plaintiff, if the notice is not given. But it does not become necessary to place this case upon that ground, as the court are of the opinion that notice was given in such manner as substantially complied with the law. This, we think, has been in effect settled for more than twenty years by the court of last resort in the State. The statute provided for no particular form of process or mode of giving notice to the defendants. The necessity of giving any notice is only to be inferred from the fact that the heirs are required to be made defendants. This omission in the law had to be supplied by a course of practice in the several courts invested with the jurisdiction, and it is in no way surprising that entire uniformity was not secured. This fact demonstrates the propriety of upholding any form of notice that afforded a reasonable opportunity to the heirs to interpose their objection to the sale. In the case of minor heirs the practice was general to serve the process upon the general guardian, or a guardian *ad litem*, or to permit an appearance without by either. The correctness of this practice was first drawn in question in Ewing's Lessee *v.* Higby, 7 O. R. 198, Part 1st. In that case the heirs were minors, and two of them were not named in the petition; but their guardians, during its pendency, entered their appearance. The court held them bound by the order of sale, and decided that the proceedings could not be collaterally impeached. And in Ewing *v.* Hollister, 7 O. R. 138, Part 2d, the same order was affirmed on writ of *certiorari*. In Robb *v.* Irwin's Lessee, no process was served or issued, but the court appointed a guardian *ad litem* for the infant defendants, who appeared and answered. This was held sufficient to give the court jurisdiction, and the title of the purchaser was protected. In Snevely *v.* Lowe, 18 O. R. 368, one of the minor heirs was not made a party to the petition, nor was any process issued or served. A guardian *ad litem* was appointed who filed an answer for the minor heirs, without specifying whether for those named in the petition alone or for all the minor heirs of the decedent. But the court construed the answer to include them all, and held the proceeding effectual to transmit the title to the purchaser. Thus has the Supreme Court of the State, from the first to the last, uniformly decided that an actual service of process upon the minor heirs was not necessary to give the court jurisdiction, or even to the regularity of the proceedings. That it was enough that a guardian, either especially appointed for the purpose or having the care and custody of the infants, person or estate, was before the court when the order was made. That it was not even indispensable that the infant should be named as a party in the petition: and without directly affirming that the court could obtain jurisdiction, without having him in some way before them, I must think that the case of Snevely *v.* Lowe can be supported on no other grounds. In my opinion it can not be upon reasons assigned in the opinion. These decisions have stood as the law of the State for more than twenty years. During all that time they have constituted

erty. An order of sale was accordingly made, and the property was sold, deed executed, and by the court approved. To set up this title and to quiet the same the petition in chancery in Polk District Court was filed. To this petition one of the defendants answered. The others made default. The District Court decreed in favor of the petitioner, according to the prayer of the petitioner, and Mary Norley, the defendant who had appeared and answered, appealed. On this state of the case the cause came up for hearing on the appeal, and the judges of the Supreme Court were divided equally on the question as to whether personal jurisdiction of the infant defendant was essential in the probate court to the validity of the decree and sale. WRIGHT, Justice, was of opinion, however, that there was jurisdiction of the person, and therefore as well as on account of the division of the court, the decree appealed from was affirmed, and the sale, as a legal result of such division, was held valid.¹

§ 317. When jurisdiction has fully attached, by petition, if notice be not a condition to the validity of the proceedings, or by petition and notice, when such notice is thus required as a

rules of property, and upon the faith of them men have invested their money. If ever an urgent case for the application of the maxim *stare decisis* existed, this is one. It is not enough that we should doubt their correctness, or that we should decide differently, if the question was now for the first time presented. It must be made to appear clearly and unquestionably that the rules of law have been violated, and the rights of the parties disregarded, before we could justify ourselves in questioning their authority. No such case is made; the question was a doubtful one, and has been settled, and one plain duty is to let it remain settled. In no one of these cases has the court gone further than the Supreme Court of the United States in Grignon's Lessee v. Astor, 2 How. 335, as will be seen by a particular examination of that case. I have not referred to the case of Adams v. Jeffries, 12 O. R. 253, cited and relied upon by the plaintiff's counsel, because the order of sale there involved was not made under the act of 1824, but under that of 1831, which specially provided the mode in which service should be made. These principles seem to us conclusively to settle the case in hand. In this case the heirs were all made parties to the petition, and service of process was regularly upon the guardian appointed for them. If the court had power to appoint them a guardian, it had power to bring him into court in this manner; and if he was in court when the order was made, the jurisdiction of the court over him and those he represented can not be questioned. It is true he filed no answer, nor does the record show that he accepted the appointment; but the want of an answer could not affect the jurisdiction, and we are bound to presume the court were advised of his acceptance of the trust before proceeding to make the final order in the case." 3 Ohio St. 494.

¹ Good v. Norley, 27 Iowa, 188.

condition to validity, then, after decree, all things else as to regularity of the proceedings and necessary to their validity, is presumed; and after confirmation are no longer open to collateral inquiry.¹

§ 318. Again, in *Florentine v. Barton*,² the Supreme Court of the United States, adhering to all its former decisions on this subject, Justice GRIER delivering the opinion, hold the following language: "The petition of the administrator setting forth that the personal property of the deceased is insufficient to pay such debts, and praying the court for an order of sale, brought the case fully within the jurisdiction of the court. It became a case of judicial cognizance, and the proceedings are judicial. The court has power over the subject matter and the parties. It is true in such proceedings there are no adversary parties, because the proceeding is in the nature of a proceeding *in rem*, in which the estate is represented by the administrator, and, as in a proceeding *in rem* in admiralty, all the world are parties."

In the same case the court say that in making the order of sale the probate court are "presumed to have adjudged every question necessary to justify such order or decree, viz.: the death of the owner; that the petitioners were his administrators; that the personal assets was insufficient to pay the debts of the deceased; that the private act of assembly as to the manner of sale was within the constitutional powers of the legislature, and that all the provisions of the law as to notices, which are directory to the administrators, have been complied with."

The court moreover hold substantially and expressly, in the same case, that such order, whether correct or incorrect, is final and binding, unless reserved for error, and is everywhere, in every court, binding in every collateral proceeding; and that a purchaser under the same is not bound to look further than the order of the court, or to "inquire into its mistakes." That the court ordering the sale is not bound to enter all things on

¹ Morrow *v.* Weed, 4 Iowa, 77, 87; Carter *v.* Waugh, 42 Ala. 452; Myer *v.* McDougal, 47 Ill. 278; Frazier *v.* Steenrod, 7 Iowa, 339; Hart *v.* Jewett, 11 Iowa, 276; Davenport Loan Assoc. *v.* Schmidt, 15 Iowa, 213; Sheldon *v.* Newton, 3 Ohio St. 495; Simpson *v.* Hart, 1 Johns. Ch. 91; Grignon's Lessee *v.* Astor, 2 How. 319, 340; Fox *v.* Hoyt, 12 Conn. 491; Paul *v.* Hussey, 35 Maine, 97; Goudy *v.* Hall, 36 Ill. 313; Moore *v.* Neil, 39 Ill. 256, 262; Comstock *v.* Crawford, 3 Wall. 396.

² 2 Wall. 216.

its record; and that "a different doctrine" would render "titles under a judicial sale worthless and a 'mere trap for the unwary.'"

The court thus re-affirm the doctrine and the case of *Grignon's Lessee v. Astor*, and so they do again in the case of *Comstock v. Crawford*,¹ wherein the same principles are reiterated and affirmed, as in *Florentine v. Barton*, above referred to; and the latter case is cited and relied on as in point.

§ 319. But the ruling is uniform that in chancery proceedings, in a regular court of chancery, if it appear affirmatively, where there are litigant parties, that there was no service of notice on the defendant, and there be no appearance, a decree and sale disposing of the defendant's rights are void.² In Ohio, it is said that the appointment of a guardian *ad litem* for minor defendants is to enable them to defend and is after they are in court, in a regular chancery cause, and not to bring them in.³ But in the probate court, in administrations, the property is assets in the control of the court, first for payment of debts; remainder to the heirs. The latter are not absolutely necessary as parties, unless made so by express statute as a condition to validity of the decree.

And where by statute, in proceedings in probate by an administrator to sell a decedent's lands for the payment of debts, the heirs are required to be made parties and no particular mode is prescribed for making them such, the law is complied with by the appointment of a guardian *ad litem* for infant heirs, so far as to them.⁴

§ 320. Notwithstanding the diversity of decisions and statutory regulations of the different States upon this subject, we think the following conclusions are borne out as general principles by the rulings of the courts in relation to sales of lands in probate for payment of debts: *First*—That all property of a decedent, which was liable to execution sale while he lived, is subject to an implied lien in favor of his creditors for payment of his debts at his death, which lien is paramount to the rights acquired by bequest or by heirship. *Second*—The enforcement of this lien is against the title of the ancestor or testator, as the

¹ 8 Wall. 396, 406.

² *Moore v. Starks*, 1 Ohio St. 369.

³ *Ibid.*

⁴ *Robb v. Irwin*, 15 Ohio, 689; *Lewis v. Lewis' Admr.*, 15 Ohio, 715.

case may be, and may be enforced in any manner which the law-making power may prescribe. *Third*—That both legatees and heirs take subject to this lien, and also subject to this paramount power of the State to enforce the lien in its own way, before its benefits, conferred on the heirs and permitted to be conferred by will upon legatees, shall unconditionally and absolutely inure to them. *Fourth*—That in the proceedings to enforce such lien by sale of lands, jurisdiction over the particular case and lands must attach by a petition good upon demurrer. *Fifth*—That if, by statute, no notice to the heirs or legatees be required, then none need be given. The power of the court is over the property and title of the ancestor. *Sixth*—That if by law a notice is required, and the law in that respect is directory only, then the omission thereof, though error for which a decree will be reversed, will not invalidate a sale thereon if the decree is permitted to stand; but if it is not apparent whether notice was given or not, then in such case, after decree, the law presumes the notice to have been given, and a sale thereon is valid. *Seventh*—That if by law a notice is required, and the law provides that unless it appear from the records to have been given, the proceedings shall be invalid; then it must so appear from the records, else the decree and sale will be void. *Eighth*—That where notice is required, as in either of the cases above stated, if it appear that there was what stands for notice, and that it was in the right case as to the lands described and against the right persons, if notice be required to the persons, that the proceedings and sale will be valid in that respect, although the notice or service thereof be irregular or defective, for the matter after decree is *res judicata*, and at most but error of judgment.

§ 321. If notice of application be by law required, then the petition must be presented at the term of court named in the notice; but not necessarily on the first day of the term. The term in law is but one day in that respect. If a term intervene, that is, if the notice be of one term, and the petition be not presented then, but is presented at the succeeding term, it is *coram non judice*, and the proceeding will be void.¹ There can not be a continuance of the application until the petition is filed, for until then there is no cause to continue. The proceedings, if

¹ *Schnell v. Chicago*, 38 Ill. 382; *Morris v. Hogle*, 37 Ill. 150; *Turney v. Turney*, 24 Ill. 625; *Goudy v. Hall*, 36 Ill. 313, 316.

a term intervenes without a petition being filed, abate by operation of law. Any subsequent proceedings based thereon are void.¹

§ 322. But if the petition be presented at the term designated in the notice, and the case be docketed, and continued by the court until the next term, and such facts appear of record, then the action of the court at such subsequent term will be of like validity as if had at the time the petition is presented.² By failure to file the application at the time designated in the notice the proceedings abate, and to give the court proper jurisdiction, where notice is required, a new notice is necessary.³

§ 323. As a pre-requisite to making the order of sale, the claims of the creditors should first be adjudicated so as to exhibit or show what is chargeable against the lands.⁴ And in some of the States the petition is required to state the names of the heirs, or else the order or decree will be void,⁵ unless the proceedings be entitled against the *unknown* heirs, under the statute, and it be therein stated that the heirs are unknown.⁶

§ 324. It is held in New Hampshire that if the sale be void, a new order and sale may be made, although the proceeds of the first sale went to the creditors.⁷

§ 325. In Mississippi it must affirmatively appear in the proceedings that the statutory requirements are conformed to, else the sale will be void.⁸

¹ Schnell *v.* Chicago, 38 Ill. 394.

² Ibid. In this case the court say: "The question then is, was such presentation of the petition at the September term, when notice had been given, it would be presented at the August term, a compliance with the statute, and if not such compliance, does it not render the proceedings void? This question has already been determined by this court. The case of Turney *v.* Turney's Admr. 24 Ill. 625, is in point. In that case notice was given by the administratrix that she would apply by petition to the circuit court of Jo Daviess county, at the July term, 1847, for an order to sell the real estate of the intestate. The petition was not filed until the following September term, and this court held that the failure to file the petition at the time specified in the notice and petition, and to have the cause docketed at the July term, abated the proceeding, and before any other steps could be taken the heirs and parties in interest should have been again brought into court by another notice, as if none had been previously given." P. 392.

³ Turney *v.* Turney, 24 Ill. 625; Schnell *v.* Chicago, 38 Ill. 382.

⁴ Cralle *v.* Meem, 8 Gratt. 496.

⁵ Talley *v.* Starke, 6 Gratt. 339; Guy *v.* Pierson, 21 Ind. 18.

⁶ Ibid.

⁷ Willson *v.* Bergin, 28 N. H. 96.

⁸ Gelstrop *v.* Moore, 26 Miss. 206.

§ 326. In Texas the application is to be made by a creditor, heir, or legatee. An order of sale made on the application of the administrator alone, is invalid to confer title by sale under it, and if a sale be made thereon, it will be set aside on application for that purpose, although a lapse of more than five years time intervene between the time of such application and the day of sale.¹

§ 327. The court has power to order the sale to be made on a credit, and may prescribe the terms thereof.²

§ 328. The order of sale must be confined to the lands described in the petition as those which it is desired to sell.³ The order may be that the sale be public, or that it be private, at the discretion of the court.⁴ No more land should be sold than is required to pay the debts, unless the sale of part only will injure the residue.⁵ But selling a larger quantity will not always invalidate the sale.⁶

§ 329. In Illinois the court must have jurisdiction of the persons of the heirs in proceedings by an administrator to sell the land of a decedent to pay debts, and a decree made on the mere answer of the guardian *ad litem*, where no such jurisdiction had attached, is void, and so is a sale made thereon.⁷ But if the court obtains jurisdiction of the case, and the subject matter and parties thereof, where jurisdiction of the persons is required, it matters not that errors or irregularities may intervene in the course of the proceedings. They will neither be void, nor will the court, for such irregularity or errors, without other cause, set the sale aside.⁸ The sale, when confirmed, will be valid, irrespective of mere irregularities or errors in the proceedings. So, too, in Arkansas; mere irregularities will not vitiate the pro-

¹ Miller *v.* Miller, 10 Texas, 319.

² Reynolds *v.* Wilson, 15 Ill. 394.

³ Williams *v.* Childress, 25 Miss. 78.

⁴ *Ex parte* Cousins, 5 Greenl. 240.

⁵ Black *v.* Meek, 1 Ind. 810; Merrill *v.* Harris, 26 N. H. 142.

⁶ Runyon *v.* Newark Rubber Co., 24 N. J. 469.

⁷ Clark *v.* Thompson, 47 Ill. 25; Herdman *v.* Short, 18 Ill. 59; Johnson *v.* Johnson, 30 Ill. 215; Fell *v.* Young, 63 Ill. 106; Gibson *v.* Role, 27 Ill. 88; Botsford *v.* O'Conner, 57 Ill. 72; Donlin *v.* Hettinger, 57 Ill. 348. (In the case here cited the Supreme Court of that State, BREESE, J., say: "The doctrine of Grignon's Lessee *v.* Astor, 2 How. 340, has never been the doctrine of this court, but often repudiated." Fell *v.* Young, *supra*.)

⁸ Carter *v.* Waugh, 42 Ala. 452; Madden *v.* Cooper, 47 Ill. 362.

ceedings or the sales.¹ When the sale is confirmed by the court, all anterior questions arising collaterally are precluded. But, until confirmation, the sale is incomplete, and confers no rights.²

§ 330. The purchaser at an administrator's sale of lands in probate is not bound to look behind the decree more than to see if there was jurisdiction in the court making it of the subject matter and of the parties in interest.

§ 331. And though the sale be for the payment of debts some of which were fraudulent, and the administrator may have been party to their fraudulent admission, yet such circumstances will not avoid the sale in collateral proceedings when a portion of the claims were just; at most, it would only be voidable after confirmation, in a direct proceeding in chancery to set it aside. Nor will it alter the case if the purchaser have notice of or participate in the fraud. After confirmation the remedy is, in either case, by original bill. The sale can not be attacked successfully in a collateral proceeding.³

§ 332. It is well settled, in Indiana, first upon general principles, and subsequently under the statutes of that State, that a sale of the realty, by an administrator, without notice to the heir, though ordered and confirmed by the court, is absolutely void.⁴ This is not only upon the general principle that to give validity to the proceedings the court must have jurisdiction of the parties by service or appearance, as well as of the subject matter,⁵ as originally held in that State previous to the enactment of 1843; but, as ruled subsequently under said statute, which declares that the petition must state the names and age of the heirs or others in interest, if known, and if unknown, that such want of knowledge should be stated; that no order of sale shall be made without notice to such heirs or others in interest; personal notice if residents of the State, and by publication if non-residents.⁶ But every reasonable intendment or presumption is made in favor of the proceedings where the record comes collaterally in ques-

¹ *Thorn v. Ingram*, 25 Ark. 52.

² *Mason v. Osgood*, 64 N. C. 467; *Rawlings v. Bailey*, 15 Ill. 178; *Ayers v. Baumgarten*, 15 Ill. 444, 446; *Young v. Keogh*, 11 Ill. 642.

³ *Myer v. McDougal*, 47 Ill. 278.

⁴ *Hawkins v. Hawkins*, 28 Ind. 70, 71; *Babbitt v. Doe*, 4 Ind. 355; *Doe v. Anderson*, 5 Ind. 33; *Doe v. Bowen*, 8 Ind. 197; *Gerrard v. Johnson*, 12 Ind. 636; *Wort v. Finley*, 8 Blackf. 335; *Bliss v. Wilson*, 4 Blackf. 169.

⁵ *Hawkins v. Hawkins*, 28 Ind. 66, 71.

⁶ *Ibid.*

tion and there is no disclosure whatever in the same negativing jurisdiction of the person.¹

And where the petition for leave to sell lands of minor heirs was filed, and a guardian *ad litem* for the heirs appointed all at the same time, without actual notice to the heirs, but in which proceeding the guardian *ad litem* appeared and answered, admitting the truth of the petition, and the court ordered a sale which was made and confirmed, it was held that though the order of sale was erroneous, it was not a nullity, and that the sale and purchase under it were valid.²

§ 333. Where, however, in a like case, under the act of 1843, the general guardian of the minor heirs appeared and filed an answer stating that he neither admitted nor denied the matters charged in the petition, and waived service of notice on his wards, the court decreed an order of sale upon such petition and answer, and the sale was made, it was held that the sale and the order of sale were nullities when the same came in question in a collateral proceeding.³

§ 334. The infancy of the heirs does not excuse the service of process or notice on them, where the statute makes notice necessary to the validity of the proceeding.⁴ Such service being omitted seems not to render the order void, where a guardian *ad litem* is appointed and appears for the minors; still, as we have seen, its omission is error.⁵

§ 335. Where a creditor of a deceased debtor would otherwise have a right to an order in probate for sale of the realty to pay his debt, but has been prevented by destruction of the records by fire or other circumstances not arising from any fault of his own, from enforcing his claim by administrator's sale of the realty, and the estate of the decedent still remains unsettled without any evidence or basis in the probate court of assets or data from which to procure a settlement, decree of sale or payment, such creditor may, upon the general principles of equity jurisdiction, obtain relief in the ordinary court of chancery by

¹ *Ibid.*; *Horner v. Doe*, 1 Ind. 130; *Doe v. Harvey*, 5 Blackf. 487.

² *Thompson v. Doe*, 8 Blackf. 336.

³ *Doe v. Anderson*, 5 Ind. 33.

⁴ *Hawkins v. Hawkins*, 28 Ind. 66, 72; *Hough v. Canby*, 8 Blackf. 301; *Peoples v. Stanley*, 6 Ind. 410; *Martin v. Starr*, 7 Ind. 224; *Pugh v. Pugh*, 9 Ind. 132; *Abdil v. Abdil*, 33 Ind. 460.

⁵ *Thompson v. Doe*, 8 Blackf. 336.

bill in equity, and a decree for the sale of the real estate to pay his debt in a direct proceeding against the heirs for discovery of assets and for relief; and in such case eight years is not deemed an unreasonable time in which to commence such proceeding.¹

§ 336. But it is also held in New York, that although sufficient time has elapsed between the grant of administration and the time of the application to the surrogate's court for the order of sale to cause the court to reject the application, that nevertheless if the court grant the order, it is but error, and can be corrected only by appeal. That until reversed the proceeding will be valid, and being so, of course a sale in accordance with it, and in other respects sufficient, would also be valid. The erroneous judgment of the surrogate, given in a proceeding wherein jurisdiction has attached, will not be void, and can not be treated as such in a collateral proceeding. The court having obtained jurisdiction, its order is not a nullity.²

V. WITHIN WHAT TIME, AND HOW, THE SALE IS TO BE MADE AND PERFECTED BY DEED.

§ 337. The general ruling is, that where the time or validity of the license to sell is limited to one year, or other time, the sale must be made and perfected within the limited time.³ In Michigan, however, a sale was made on the last day limited by law, and the deed was executed eighteen days thereafter, and the court held the same to be valid.⁴

Though there be no limit of time by law in which to sell a decedent's lands to pay debts, yet the power may expire by analogy to the statute of limitations.⁵ But where circumstances require it, an ordinary court of chancery, having jurisdiction of

¹ Clark *v.* Hogle, 52 Ill. 427. And one creditor alone may file such bill. *Ibid.* and 1 Story, Eq. Jur. Sec. 546.

² Jackson *v.* Robinson, 4 Wend. 437. But this decision was made previous to the passage of the revised statutes limiting the time to three years. The statutory limit is arbitrary and cuts off the power of the surrogate at the end of the time limited. If there be a remedy afterward, it must be under suitable circumstances in a court of general chancery jurisdiction.

³ Marr *v.* Boothby, 19 Maine, 150; Mason *v.* Hain, 36 Maine, 573; Macy *v.* Raymond, 9 Pick. 285; Wellman *v.* Lawrence, 15 Mass. 326, 329; Chadbourne *v.* Rackliff, 30 Maine, 354, 359; Dubois *v.* Dubois, 4 McLean, 486, 489.

⁴ Howard *v.* Moore, 2 Mich. 226; Osman *v.* Traphagen, 23 Mich. 80.

⁵ Dubois *v.* McLean, 4 McLean, 486.

the subject matter, will not be restricted by the time allowed in probate.¹

§ 338. In the case of *Clark v. Hogle*,² the ordinary court of chancery jurisdiction assumed jurisdiction and afforded relief by decree and sale of real estate of a decedent at the suit of creditors who had been prevented by accident and burning of the probate records from obtaining satisfaction of their debt by proceedings and sale in probate in the ordinary manner. In that case the proceeding was a direct one by bill in equity against the heirs of the decedent; and though the term of eight years had intervened, chancery did not consider that a sufficient time to preclude the creditor under the circumstances of the case. In such cases, equity courts have jurisdiction upon the general principles of affording relief against accidents.

§ 339. Under the New Jersey act of 1825, probate sales of lands to pay debts, if the order of sale was made within one year after decedent's death, carried whatever title and right decedent died seized of, overreaching all sales made by the heirs intermediate between the death of the deceased and the order of sale;³ but prior to this act the sale passed on such title as remained in the heirs or devisees at the date of the order of sale.⁴ Such sales are made in New Jersey, subject to incumbrances, if there are any.⁵

§ 340. The sale must be at public auction, to the highest bidder, unless a private sale be permitted by the express terms of the decree,⁶ and must be for money.⁷ If a place is by law designated at which it is to be made, it must be made thereat, or it will be void unless so made by order of the court, and confirmed; then by confirmation it is valid.

The purchaser has a right to have a title within a reasonable time, by compliance on his part with the terms of sale. The court selling should ascertain beforehand if it can make title, and if not, then not sell.⁸

¹ *Clark v. Hogle*, 52 Ill. 427.

² *Ibid.*

³ *Den v. Hunt*, 11 N. J. 1.

⁴ *Ibid.*; *Bockoven v. Ayres*, 22 N. J. Eq. 13.

⁵ *Coot's Exr. v. Higgins*, 8 C. E. Green, Ch. 308.

⁶ *Logan v. Gigley*, 9 Geo. 114; *Herrick v. Grow*, 5 Wend. 580.

⁷ *Peters v. Caton*, 6 Tex. 554.

⁸ *Myers v. Raymond's Admr.*, 5 Fla. 515; *Hamilton v. Pleasants*, 31 Tex. 638.

VI. NOT AFTER REPEAL OF THE LAW OR ABOLITION OF THE COURT ALLOWING THE ORDER.

§ 341. The power to make or carry out the sale, or to enforce the decree, ceases with the abolition of the court in which the decree is made, in case such court be abolished by law between the time of making the decree and the completion of the sale. In such case no authority remains to perfect the same, or to enforce the decree.¹

§ 342. And so a sale under an order or decree made after repeal of the law under which the proceedings and decree were had. The repeal of the law, if there be no saving clause, puts an end to the authority of the decree, and the sale is void.²

§ 343. It follows, from these principles, that if the decree itself be made under a supposed law, but which was then already repealed, and had ceased to exist, both the decree and any sale made thereon are void.³

In the case of *McLaughlin v. Janney*,⁴ the court hold the following language: "It would be a solecism, in law, to assert that persons appointed by a court to act as its commissioners can exercise that authority as commissioners of that court after the court itself has been abolished, or has ceased to exist."

And in the *Bank of Hamilton v. Dudley*,⁵ that very learned Justice, MARSHALL, says in reference to the effects of a repeal: "If the law which authorized the court to make the order be repealed, the power to sell can never come into existence."

Thus it is well settled that abolishing the court or repealing the law before enforcement of the order or decree destroys the power to execute it, if there be no saving clause, and terminates the proceedings.

VII. THE OATH AND BOND.

§ 344. When, by law, an oath is required to be taken by the administrator or executor, in reference to selling, it should be taken before fixing the time and place and giving notice of sale,

¹ *McLaughlin v. Janney*, 6 Gratt. 609, 614.

² *Perry v. Clarkson*, 16 Ohio, 571; *Canpau v. Gillett*, 1 Mich. 416; *Bank of Hamilton v. Dudley*, 2 Pet. 493, 509.

³ *Ludlow v. Wade*, 5 Ohio, 494.

⁴ 6 Gratt. 609, 614.

⁵ 2 Pet. 493.

and not merely before the act of selling or the execution of the deed. The taking of the oath in such cases should be the first step taken in proceedings to sell.¹

§ 345. If the law requiring the oath is only directory, and it does not appear from the proceeding whether it was taken or not, then the presumption of the law is that it was taken, if jurisdiction had attached; and the question will not be open to collateral inquiry.² And so, too, though the validity of the proceedings are, under the statute, dependent on the taking of the oath, if it do not appear whether it was taken or not, and jurisdiction had attached, then the presumption is that the oath was properly taken.³

§ 346. But where, by statute, or by the settled rulings of the court, it is requisite to the validity of the sale, that from the records and proceedings it shall appear that the requisite oath has been taken, then if from the records and proceedings it does not appear to have been taken, there is in such case no intentment of law to help out the proceedings; but the sale made therein is void, and will be so treated when collaterally drawn in question,⁴ except such validity as may be given to it by long and uninterrupted possession, and by lapse of time.

§ 347. Ordinarily, the lands of a decedent are not assets in the hands of his administrator of that character which are represented or covered by the administrator's ordinary bond, and therefore the sureties in such bond are not liable thereon for funds misapplied or lost by the administrator which are realized by or received from the sale of the lands; and though it is usual, on decreeing a sale of the realty, to require of the administrator an additional bond in that respect, yet if not so required by the court, the sureties in the *administration* bond are not responsible for the omission.⁵

¹ Parker *v.* Nichols, 7 Pick. 111, 116; Cooper *v.* Sunderland, 3 Iowa, 114; Campbell *v.* Knights, 26 Maine, 224; Thornton *v.* Mulquinne, 12 Iowa, 549, 554; Little *v.* Sinnett, 7 Iowa, 324; Morrow *v.* Weed, 4 Iowa, 77.

² Voorhees *v.* U. S. Bank, 10 Pet. 449, 476, 477.

³ Voorhees *v.* U. S. Bank, 10 Pet. 449, 476, 477; Babcock *v.* Cobb, 11 Minn. 347.

⁴ Cooper *v.* Sunderland, 3 Iowa, 114, 137, 138; Thornton *v.* Mulquinne, 12 Iowa, 549, 554; Babbitt *v.* Doe, 4 Ind. 355.

⁵ Strother *v.* Hull, 23 Gratt. 652. (Such liability is not within the undertaking of their bond.) Andrews *v.* Avory, 14 Gratt. 229. The sale is made by him when made under order of court, rather as *commissioner* of the court than

And so of the bond, if one be required by the statute, to be given before proceeding to sell, the same principles apply with equal force. If the law is merely directory, non-compliance, though an irregularity, is not chargeable on the purchaser, so as to invalidate the sale. But if made a condition to validity, and it be also required that compliance must appear of record, then the proof of such compliance must appear accordingly, as it can not, in such case, be supplied by intendment, and the purchaser in buying acts at his peril.¹ It is then no hardship, that claiming under the law, he must show conformity to the law, when the law itself makes such conformity a condition to the validity of his claim.

If, however, the statute be only directory, and it do not appear that there was compliance, the law presumes that there was, and the sale as to that question is valid, if jurisdiction had attached. And so, if validity is dependent on compliance as to bond, the law presumes, in case jurisdiction has attached, that the bond was given, if nothing appear either way in reference thereto, and the sale will be valid *quoad hoc*, except in cases where, as above stated, proof thereof by the record is required as a condition to validity. But when the bond is essential to validity, sales are invalid, although confirmed by the court.²

§ 348. If by law a sale's bond is required, it is not a matter of discretion with the court to order one to be given; and the term, *in case any bond is required*, has reference to the law, when used in a statute and not to the requirement of the court. It is the duty of the court in such cases to take one, and if not given, the sale will be invalid, as against the heir, and it is said *even against a bona fide purchaser*.³ But *quære*? Can there in such case be a *bona fide* purchaser? To be such there must not only be *value and good faith* but also want of notice in the purchaser, and the purchaser is chargeable with notice of whatever appears, or is shown to be wanting, by the record of proceedings for the sale. These records become a part of the muniments of title.

as administrator, for without such order his powers as administrator do not enable him to sell. *Ibid.* And this is not the less so, from the circumstance that no one else than the administrator, as we have seen, can ordinarily be commissioned to sell a decedent's lands.

¹ *Gelstrop v. Moore*, 26 Miss. 206; *Washington v. McCaughan*, 34 Miss. 304.

² *Buckner v. Wood*, 45 Miss. 57; *Rucker v. Dyer*, 44 Miss. 591; *Currie v. Stewart*, 26 Miss. 644; *Hamilton v. Lockhart*, 41 Miss. 460; *Eckford v. Hogan*, 44 Miss. 398.

³ *Stewart v. Bailey*, 28 Mich. 251.

VIII. SALES MERELY IRREGULAR, OR IN IRREGULAR PROCEEDINGS, NOT VOID.

§ 349. A mere irregularity in the proceedings, or in the manner of selling or conducting the sale, if there be no want of jurisdiction in the court, will not avoid a sale of lands in probate by an executor or administrator for payment of a decedent's debts.¹

And so by statute in Maine, this principle is made to apply as against claimants under adverse sources of title, if the court granting the license or order of sale, is a court of competent jurisdiction, and the deed is duly executed and recorded.² They can not be avoided for mere irregularity.

§ 350. Nor can the validity of the sale, in a collateral proceeding, be made to depend upon the regularity of the administrator's appointment, if the appointment be mere error as in a wrong county under a law that is only directory.³ But otherwise if the law inhibit such appointment.⁴

§ 351. If the sale be reported and approved by the court, then it may not be impeached collaterally for any irregularity or insufficiency in the notice given of the sale. If the probate court err in adjudicating the notice to be a sufficient one, when in truth it is not in legal compliance with the law, this error is to be corrected on appeal and can not be taken advantage of in collateral proceedings involving title under the sale.⁵ In *Morrow v. Weed*,⁶ the Supreme Court of Iowa, WOODWARD, Justice, say: "If this were admissible, then every question relating to the sufficiency of a notice and of its service, too, in any of the courts, could be brought up and reviewed in the same manner."

¹ *Vansycle v. Richardson*, 13 Ill. 181; *Freelan v. Dazey*, 25 Ill. 294; *Madden v. Cooper*, 47 Ill. 359, 362; *Iverson v. Loberg*, 26 Ill. 179; *Shoemate v. Lockridge*, 53 Ill. 503; *Ewing v. Higby*, 7 Ohio, 198; *Grignon's Lessee v. Astor*, 2 How. 319; *Comstock v. Crawford*, 3 Wall. 396; *George v. Watson*, 19 Texas, 354; *Succession of Guerney*, 14 La. Ann. 632; *Gregory v. McPherson*, 13 Cal. 174, 562; *Pattee v. Thomas*, 58 Mo. 163, 175; *Rugle v. Webster*, 55 Mo. 246; *Bobb v. Barnum*, 59 Mo. 394.

² *Webster v. Calden*, 53 Maine, 203.

³ *Wight v. Wallbaum*, 39 Ill. 554; *Schnell v. Chicago*, 38 Ill. 382; *Coon v. Fry*, 6 Mich. 506.

⁴ *Cutts v. Haskins*, 9 Mass. 543.

⁵ *Morrow v. Weed*, 4 Iowa, 77; *Little v. Sinnett*, 7 Iowa, 324, 335.

⁶ 4 Iowa, 91.

§ 352. Sales in probate will be presumed to have been made under the general law upon that subject, and purchasers have a right so to consider, when bidding, if the contrary be not actually made known, although there be a special statute authorizing a different course in particular instances; such special acts are merely *permissive*, and are not exclusive, and therefore if the sale be such as is valid under the general law, it will be valid notwithstanding any special law, merely permissory in its character authorizing a different procedure, and although the officer or person selling designs to proceed under the special statute.¹

§ 353. A sale of real estate by an administrator, under an order in probate for payment of debts, is not invalid because it is not made for as large a sum as is required to be raised if the sale be in other respects fair and regular and as a sequence to the validity of the sale, the deed, if in other respects sufficient will be valid also.² The administrator is not bound to sell all the lands at once,³ nor to refrain from selling if the whole be offered and does not command as much money as is required to pay the debts.

§ 354. Thus where the court is in relation to probate business, a court of general jurisdiction, its orders and decrees, if jurisdiction once attach, are not void, though made in error; and they can not be impeached, collaterally.⁴

§ 355. Such sales, in Connecticut, are to be made for ready money, and if the administrator do otherwise he is responsible on his bond. Nor will the circumstance that he may have been prompted by good motives, or even that he observed prudence in the obtaining of security in selling on credit.⁵

§ 356. On a sale of lands in probate, for payment of debts, where the statute required certain newspaper notices, or the posting of handbills, at the discretion of the court, and it not appearing that the requirements of the statute were in that respect complied with, it was held, after confirmation of the sale, that the probate court is presumed to have dispensed with a

¹ Browning *v.* Howard, 19 Mich. 323.

² Seymour *v.* Seymour, 22 Conn. 272.

³ Ibid.

⁴ Andrews *v.* Avory, 14 Gratt. 229; Fisher *v.* Bassett, 9 Leigh, 119; Burnley *v.* Duke, 2 Rob. 102; Shultz *v.* Shultz, 10 Gratt, 358; Hutcherson *v.* Priddy, 12 Gratt. 85; Cox *v.* Thomas' Admr., 9 Gratt, 323.

⁵ Foster *v.* Thomas, 21 Conn. 285.

more full compliance with the statute in the exercise of the discretion expressly conferred on it in that respect, and therefore that the sale could not, for such supposed irregularity, be collaterally impeached.¹

§ 357. In Georgia, the jurisdiction of the ordinary in ordering sales of a decedent's lands, by the administrator or executor, is not local to the lands situated in the county wherein the order is made, but is general as to any county, and, therefore, sales by administrators are presumed to have been made where ordered, until the contrary is shown, and this showing may not be made in a collateral proceeding, but must be on direct application to set the same aside; and moreover, are not even voidable for such cause as against innocent and *bona fide* purchasers.²

§ 358. And so, upon the general principle that mere irregularities do not vitiate judicial proceedings, sales in probate of real estate in Arkansas carry title, although irregular, jurisdiction in the court having attached in making the decree of sale. The proceeding is *in rem*, and where jurisdiction attaches the validity of the sale can not be collaterally brought in question.³

§ 359. The ordinary appraisement laws in reference to sales of property on writs of execution do not apply to judicial sales properly, but where by law appraisement is expressly required in making judicial sales, or sales in probate of a judicial character, such appraisement has been held sufficient, when made after the sale, when the sale had been made with the understanding that it was subject to appraisement of the property.⁴

§ 360. In proceedings in probate by an executor or administrator, for sale of a decedent's lands which are situated in two or more different counties, the notice of application to the court for the order of sale need only be published in the county wherein the court sits to which the application is made, if there be no express requirement of the statute for other or additional publications thereof.⁵

¹ Jackson *v.* Magruder, 51 Mo. 55; Adams *v.* Larrimore, 51 Mo. 131; Tutt *v.* Boyer, 51 Mo. 425; Spaulding *v.* Baldwin, 31 Ind. 376; Crossley *v.* O'Brien, 24 Ind. 325.

² Patterson *v.* Lemon, 50 Geo. 231.

³ Sturdy *v.* Jacoway, 19 Ark. 499; Borden *v.* The State, 11 Ark. 519; Rogers *v.* Wilson, 13 Ark. 507; Bennett *v.* Owen, 13 Ark. 177.

⁴ Bobb *v.* Barnum, 59 Mo. 394.

⁵ Gavin *v.* Graydon, 41 Ind. 559.

Nor is it necessary, where the court has general jurisdiction of the subject matter, that the record show notice to have been published at all, unless there is a statutory provision making such showing indispensable to the validity of the sale; for if nothing to the contrary appear, notice will be presumed to have been given in all collateral proceedings.¹

§ 361. And, although omission to conform to the decree or order of sale by the officer or person conducting it will ordinarily vitiate the sale, if in a substantial particular, yet a departure therefrom in reference to the *notice* of sale will not have that effect as against a *bona fide* purchaser, after the sale has been reported to and confirmed by the court, and completed by payment and conveyance;² for the same power that the court has to order the particular manner thereof, is competent to ratify the sale, without conformity thereto, or to treat the matter of non-conformity, after report of the sale, as dispensed with.

IX. CONFIRMATION — THE DEED — ITS APPROVAL.

§ 362. In some States the practice is to confirm the sale by order in probate of record, and therein direct the execution of the deed.³ In others, the usual course is for the administrator or executor to execute the deed, and report the same with the sale for approval; and thereupon, if acceptable to the court, an order approving the deed is made, and is endorsed upon the deed.⁴

§ 363. If the administrator or executor die before carrying the order into effect by a complete sale, his successor should complete the sale and make the deed, or else apply to the court for orders in that respect.⁵

§ 364. Confirmation of sale by the probate court exhausts the

¹ *Horner v. Doe*, 1 Ind. 130; *Doe v. Harvey*, 3 Ind. 104; *Doe v. Bowen*, 8 Ind. 197; *Gerrard v. Johnson*, 12 Ind. 636.

² *Hanks v. Neal*, 44 Miss. 212; *Miner v. The President and Selectmen of Natchez*, 12 Miss. 602; *Bland v. Muncaster*, 24 Miss. 62.

³ *Wells v. Mills*, 22 Texas, 302; *Dowling v. Duke*, 20 Texas, 181; *Bradbury v. Reed*, 23 Texas, 258; *Smith v. Chew*, 35 Miss. 153; *Halleck v. Guy*, 9 Cal. 181, 195; *Yerby v. Hill*, 16 Texas, 377; *Osman v. Traphagen*, 23 Mich. 80, 85; *The People v. Judge of 3d Circuit*, 19 Mich. 296.

⁴ *Wade v. Carpenter*, 4 Iowa, 361, 366; *Morrow v. Weed*, 4 Iowa, 77.

⁵ *Baker v. Bradshy*, 23 Ill. 632. This case was in reference to a sale of slaves, but the principle applies with still greater force as to land.

jurisdiction in probate over that particular subject matter, and the probate court can not thereafter set aside the sale and award a new order or license of sale.¹ And if the court of probate attempt to review and set aside such sale and act of confirmation after making the same, and to order a sale anew, a court of general jurisdiction will, by writ of prohibition, prevent its action in that respect on proper application of the party in interest.²

§ 365. Though the recitals required be not made, in a deed upon judicial sale, yet such omission does not invalidate the instrument as a conveyance when the statute is merely directory, and does not expressly make the validity thereof dependent upon the recitals.³

§ 366. Judicial sales, when perfected by confirmation, payment and deed, take effect as to carrying title by relation to the date of the lien, if sold to satisfy a lien, and if not a lien, then by relation to the decree or the seizure under which the decree is made.⁴

§ 367. Sales, in Texas, under decrees, are *judicial* sales, and after confirmation are not subject to collateral impeachment. The proceeding is *in rem*, and the doctrine of *caveat emptor* applies.⁵

After confirmation the court of probate has no power to revoke a deed made by its order.⁶

The general rule holds good in that State in relation to both judicial and execution sales that persons concerned in selling can not buy.⁷

§ 368. And it matters not that the sale be made under the statute regulating sales in equity; it must, nevertheless, be confirmed to give it validity. Such statutes (if they do not expressly

¹ The State *ex rel. etc. v.* Probate Court, 19 Minn, 117; Spencer *v.* Shehan, 19 Minn. 338, 341. And so the order of sale is exhausted by selling to the amount of the sum named in the order, and if further sale be afterward made, without a further order, such latter sales should not be confirmed. Wells *v.* Mills, 22 Texas, 302.

² The State *ex rel. etc. v.* Probate Court, *supra*.

³ Bobb *v.* Barnum, 59 Mo. 394, 398.

⁴ Osterberg *v.* The Union Trust Co., 8 Otto, 364, 365, 424, 428.

⁵ Lynch *v.* Baxter, 4 Tex. 431; Poor *v.* Boyce, 12 Tex. 440; Baker *v.* Coe, 20 Tex. 429; Brown *v.* Christie, 27 Tex. 76; Edmonson *v.* Hart, 9 Tex. 554; Williams *v.* McDonald, 13 Tex. 322.

⁶ Davis *v.* Stewart's Admr., 4 Tex. 223; Alexander *v.* Maverick, 18 Tex. 179.

⁷ Hardy *v.* De Leon, 5 Tex. 212.

dispense with confirmation) are made in reference to the practice of confirmation, and are to be so construed, it being a generally recognized principle in equity jurisprudence that sales under decrees are never final until confirmed by the court.¹

§ 369. After confirmation the validity of the sale can not be drawn in controversy in any collateral proceedings. It can, then, only be attacked by some direct proceeding set on foot expressly for that purpose.² So, also, if under the local statute, or practice, no confirmation is required, then the same validity attaches to the sale as if confirmed.³

§ 370. Nor can the action of the court, having general jurisdiction on the subject, granting letters of administration, be inquired into in a collateral proceeding involving the validity of an administrator's sale of his intestate's real estate. The court being the proper one to take jurisdiction of that subject matter, its action, however erroneous, will be held not only valid, but if the jurisdiction has attached by a proper application, it is to be regarded as evidence of the existence and proof before the court granting the letters of administration, of all other things necessary thereto.⁴ And on such collateral inquiry, it is also held that notice of a petition to sell *all the real estate belonging to the estate*, for the purpose of paying the debts, is tantamount to a notice, required by the statute, of application to sell "the whole or so much thereof as will be sufficient to pay his debts;" and that the finding of the court making the order of sale that notice had been given, is conclusive in a collateral inquiry.⁵

Also, that a notice stating that to pay the debts there remained only certain lands, describing them, is equivalent to the allegation that decedent was seized thereof.⁶

§ 371. The ruling in California is that the probate court has power to enforce the execution of the deed in judicial sales of lands made under orders in probate, where the sale has been approved or confirmed by the court, and the purchase money

¹ Demaray v. Little, 17 Mich. 386.

² Eaton v. White, 18 Wis. 517. See Post, Sec. 479, note 1.

³ Hobson v. Ewan, 62 Ill. 146.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid. Nor can it be objected as between the heirs and the grantee of the deed that the deed is made to the assignee of the person purchasing at the sale. Ibid.

has been paid.¹ But by what process or means its authority is to be enforced is not distinctly shown. Whether by a procedure against the person, as for contempt, or by vacating the letters of administration, and appointment of one who will carry out and perfect the same, and by making an order that such successor convey, is not indicated.

§ 372. One buying at an administrator's sale in probate, lands belonging to minors, under a promise, though a verbal one, to hold for their benefit, becomes a trustee in that respect for them. And if afterward he becomes their guardian, and sells the property so purchased at an advanced price, he will be chargeable on his account in court as guardian with the difference in price realized by the sale.² A purchase made under such circumstances, whether the purchaser become thereafter guardian for the minors or not, places him in a fiduciary relation to the minors, and the trust can be enforced, or the sale set aside on proper application by them before sale by him to a *bona fide* purchaser.

So, if a purchaser at judicial sale profess to buy, for the benefit of the absent owner, and thereby obtain the property at an inadequate price, equity will account him a trustee for the former owner, or else charge him with the difference in value between the value of the property and the price paid by him.³

Yet, if he promptly and in good faith offer to the debtor or former owner the benefit of the purchase, and to restore the property to him on payment of what will make him safe, and he decline to take it, and avows an intention to abide by the sale, equity afterward will not disturb the rights of the purchaser in his legal title under the sale.⁴

§ 373. In Wisconsin, the ruling is that a mortgage creditor is not bound to present his claim for allowance against the estate of his deceased debtor, but may foreclose judicially, and sell the mortgaged premises, and that therefore a sale and conveyance of lands in probate, otherwise regular, but in the proceedings for which the mortgage creditor holding a mortgage upon the same lands is not made a party, will be postponed as to priority in

¹ The Matter of the Estate of Lewis, 39 Cal. 309.

² Hayman's Appeal, 65 Penn. St. 433.

³ Roach *v.* Hudson, 8 Bush, 410.

⁴ Ibid.

favor of the mortgagee, and that a sale and conveyance under the mortgage judicially made will take priority as to the mortgaged property over the administrator's deed, made under the *general* provisions of the law in respect to such sales.¹

¹ *Edgerton v. Schneider*, 26 Wis. 385.

CHAPTER VI.

JUDICIAL SALES OF LANDS BY GUARDIANS, AND IN
PROCEEDINGS FOR PARTITION.

- I. GUARDIAN'S SALES.
- II. SALES IN PROCEEDINGS FOR PARTITION.

I. GUARDIAN'S SALES.

§ 374. In England, the king being sovereign, is by the common law regarded as the universal guardian of all infants or minors.¹ Hence this authority was an attribute of the judiciary, when, as was the case originally, the king held the courts himself in person. It followed that when the judicial power was transmitted from the king in person to the judges by him appointed to hold the courts in his stead, that this attribute of guardianship then devolved upon the courts, whence it eventually centered in the chancellor, whose court is always open. Whether by usurpation, as by some jurists contended,² or by legitimate means, as alleged by others,³ is no longer material. Suffice it to say it was there firmly lodged, and the chancery court came to be regarded as guardian of the interests of all minors.⁴

This authority as to administrative matters came to be conferred on others selected and appointed by the chancellor, from time to time, for infants generally, as necessity should require, and as ultimately regulated by act of parliament, chancery, however, retaining and maintaining its supervisory power over both guardians so appointed and over their wards, and their interests, both moral and pecuniary. This, too, even to the extent of superseding the authority of the parent for the interest of the child.⁵

§ 375. Now, such being the powers of the king, the parliament, and the courts under the crown, not only as to England, but as to the colonies also, they legally devolved upon the several

¹ Bac. Abt. Vol. 4; Title, Guardian, C.

² Co. Lit. 128; note 16.

³ Fonblanche's Eq. Vol. 2, pp. 225, 226, and note a.

⁴ Bac. Abt. Vol. 4; Title, Guardian, C.

⁵ Ibid.; Whitfield v. Hales, 12 Ves. 492; *Ex parte Warner*, 4 Brown, Ch. 101.

sovereign States, legislatures, and courts of the several republican commonwealths established by the American revolution, and as a part of their common inheritance, and also upon the new States, their legislatures, and their courts subsequently established.

§ 376. Although in the American States the administrative powers and duties as to appointment of guardians, their ordinary supervision and accountability, and the administration of the ward's interests and care of his person is conferred and regulated by statutes conforming to the local policies of the several States, yet the uncircumscribed overruling supervisory jurisdiction of the chancellor still exists.¹ This power is to be exercised upon the great principles of equity, whenever necessity calls for it, for the protection of the infant from all abuse of his rights in property and in person when wielded by the chancellor as a judge of the court of general chancery jurisdiction, and by the probate courts of inferior jurisdiction to the extent and in the manner specified and regulated by the legislative enactments of the several States, in each State, according to the *lex loci* thereof, and the regularity of a guardian's appointment, or the validity thereof, is not open to judicial inquiry in a collateral proceeding.² Nor is it an objection to the appointment, either in a collateral or in direct proceeding, that the appointment is made by a court of *general* chancery powers and jurisdiction, instead of by the court of probate; the probate jurisdiction thereof is *cumulative*, and not *exclusive*.³ The power over all infants, and to appoint guardians for such, is peculiarly an attribute of chancery.⁴

§ 377. In some of the States it is held that a court of general chancery jurisdiction has full power to decree a sale of a minor's lands when deemed best for his interests.⁵ While in some others it is said that though chancery may exercise such a power

¹ 2 Story, Eq. Jur. Sec. 1339, 1341, 1356; *Ex parte* Crumb. 2 Johns. Ch. 439; Matter of Andrews, 1 Johns. Ch. 99; Allen *v.* Allen, 2 Litt. 95, 97; Aymar *v.* Roff, 3 Johns. Ch. 49.

² Durrett *v.* Davis, 24 Gratt. 302; Marvin *v.* Shilling, 12 Mich. 356.

³ Walker's Exr. *v.* Page, 21 Gratt. 636, 645; Durrett *v.* Davis, 24 Gratt. 302; Wayland *v.* Tucker, 4 Gratt. 267.

⁴ Wayland *v.* Tucker, *supra*.

⁵ Matter of Salisbury, 3 Johns. Ch. 347; Huger *v.* Huger, 3 Des. Eq. 18; Stapleton *v.* Longstaff, 3 Des. 22; Williams *v.* Harrington, 11 Ired. 616; *Ex parte* Jewett, 16 Ala. 409; Jarrett *v.* Andrews, 7 Bush. 311; Withers *v.* Hickman, 6 B. Mon. 295; Watson *v.* Cross, 2 Duvall, 149.

over the estates of minors that it will not be done to the disposal of a future interest except under extraordinary circumstances, and not in any case for the mere purpose of increasing the present interest of the adult owner.¹

Again, in others, the converse of this principle is asserted, and it is held that the general powers of chancery do not extend to the decreeing a sale of an infant's real estate for the mere purpose of bettering his pecuniary condition or general interests.² Formerly, the ruling in Virginia, under the act of February 18, 1853, was the other way.³

§ 378. But whatever the general powers of the chancellor may be, those of the courts of probate are such only as are conferred by statute,⁴ and must be exercised in conformity to, and only for, the causes allowed by the statutes of the respective States. Yet, if jurisdiction shall have attached, such conformity will be inferred, in most cases, after decree and sale; for although they are courts of limited powers, yet their jurisdiction is general to the extent conferred over the particular subjects by statute.⁵

§ 379. The making the order of sale presupposes the existence of all the facts and circumstances, as are required, as prerequisites to such an order, where the contrary does not appear, so that when jurisdiction has actually attached, or is thus presumed to have attached, and the contrary thereof is not shown by the record, the correctness or validity of the order of sale is not questionable in a collateral proceeding.⁶ But if the record shows the notice to be without naming time or place of hearing, then the sale is void.⁷

¹ Matter of Jones, 2 Barb. Ch. 22.

² Faulkner *v.* Davis, 18 Gratt. 651; Rogers *v.* Dill, 6 Hill, 415; Baker *v.* Lorillard, 4 N. Y. 257; Williams' Case, 3 Bland Ch. 186; Pierce *v.* Trigg, 10 Leigh, 403. Nor to improve his other land. Falls City Association *v.* Van-kirk, 8 Bush, 459.

³ Faulkner *v.* Davis, 18 Gratt. 651.

⁴ Wade *v.* Carpenter, 4 Iowa, 361; Gilmore *v.* Rodgers, 41 Penn. St. 120; Fitch *v.* Miller, 20 Cal. 352; Robert *v.* Casey, 25 Mo. 584; Palmer *v.* Oakley, 2 Doug. (Mich.) 433.

⁵ United States *v.* Arredondo, 6 Pet. 709; Iverson *v.* Loberg, 26 Ill. 179; Thompson *v.* Tolmie, 2 Pet. 157; Pursley *v.* Hays, 22 Iowa, 11; Myer *v.* McDougal, 47 Ill. 278.

⁶ Conrett *v.* Williams, 20 Wal. 226; Bank U. S. *v.* Dandridge, 12 Wheat. 70; McNitt *v.* Turner, 16 Wal. 352; Blodgett *v.* Hitt, 29 Wis. 169.

⁷ Blodgett *v.* Hitt, *supra*.

§ 380. Where, by law, the guardian is required to take a certain oath before fixing the time and place of sale of his ward's real estate about to be sold under proceedings in probate, and such oath is requisite to the making of the sale, either directly or by intendment, then a sale made without so taking the oath is invalid, although it appears to have been taken before actual sale, but after fixing the time and place of sale;¹ and this, too, though there be confirmation of the sale where confirmation is not required by the practice.²

And so, likewise, in Wisconsin, although the guardian be one appointed by a court of a different State. Under the statute, a compliance with all the pre-requisites to such sale, and to the application for the order of sale, will be presumed to have existed after order of sale judicially made, and sale thereon, followed by confirmation by the court. In an action involving the title to the real estate so sold, the validity of the sale and deed can not be brought in question, unless for some defect apparent on the face of the proceedings *actually voiding* the same.³

§ 381. In some cases it is held that the proceedings by guardian in probate for a sale of a ward's lands are adversary, and that there must be notice, or what answers in lieu thereof.⁴ In others it is adjudged that they are *in rem*; that the action of the court is on the property itself, the proceedings not adversary, and that no notice, or what may answer instead thereof, is required.⁵

§ 382. But in the latter class of cases the court of probate will protect the ward's rights by requiring notice, or by causing

¹ Blackman *v.* Bauman, 22 Wis. 611, 614; Reynolds *v.* Schmidt, 20 Wis. 374; Emery *v.* Vroman, 19 Wis. 689; Williams *v.* Reed, 5 Pick. 480; Cooper *v.* Sunderland, 3 Iowa, 114.

² Blackman *v.* Bauman, 22 Wis. 611.

³ Farrington *v.* Wilson, 29 Wis. 383.

⁴ Townsend *v.* Tallant, 33 Cal. 45; Washburn *v.* Carmichael, 32 Iowa, 475; Lyon *v.* Vannatta, 35 Iowa, 521. But if the notice be merely irregular or defective, then jurisdiction will have attached by virtue thereof, and the supposed ruling thereon as to its efficiency. If, however, it substantially amounts to no notice, or there be no notice at all, then the judgment will be void. Lyons *v.* Vannatta, *supra*. But if there be a notice shown, it must state the time and place of appearance and trial, else it will be treated as no notice at all. *Ibid.*, and Kitsmiller *v.* Kitchen, 24 Iowa, 163; Blodgett *v.* Hitt, 29 Wis. 169; Pond Doneghy, 18 B. Mon. 558; Girty *v.* Logan, 6 Bush, 8; Cornwall *v.* Cornwall, 6 Bush, 369.

⁵ Mason *v.* Wait, 5 Ill. 127; Smith *v.* Race, 27 Ill. 387; Grignon's Lessee *v.* Astor, 2 How. 319; Mulford *v.* Beveridge, 78 Ill. 455.

a defense to be interposed by a proper guardian *ad litem* if there shall be apparent cause to apprehend that the guardian is abusing his trust.¹ But if, on suggestion as *amicus curiae*, it shall appear that there be reason to apprehend an abuse of trust, then the court will appoint a guardian *ad litem*. Otherwise the proceedings to sell a ward's real estate, by his guardian in probate, are not necessarily adversary as against the ward under ordinary circumstances.²

§ 383. In the case of *Smith v. Race*,³ the court advert to their previous decision in Sturms' Case, 25th Illinois, 390, wherein they held that the minor heirs should have been made parties to the proceeding or suit of their guardian, and qualify the doctrine there asserted in the following language: "We are aware that the views here expressed are not in accordance with those announced *In re Sturms*, 25 Ill. 390. In that case it was improperly said that the minors were not parties to the original suit, and their interest could not be affected by the sale of their land by the guardian. In that we went too far, according to the case of *Mason v. Wait*."

In the cases of *Mason v. Wait* and *Smith v. Race*, the Illinois Supreme Court go to the full extent of the cases of *Grignon's Lessee v. Astor*, and of *Beauregard v. New Orleans*, on the subject in cases of sales by guardians by proceedings in probate, and hold that as the Illinois statute does not require those in interest to be made parties, that the action of the court without regard to parties is within its jurisdiction in such cases, and is valid.

§ 384. The court, in their discretion, might grant the license to sell in the alternative, so as to authorize the sale to be made privately or at public vendue, under the statute of Maine of 1826.⁴ But under the statutes of 1840 all sales of lands in that State made by orders of court are to be at public auction.⁵

§ 385. Where the proceeding in Mississippi is in probate for the sale of an infant's lands set on foot by the legal guardian of the infant, there must, in Mississippi, be not only service on the infant, but also a guardian *ad litem* appointed for such infant by the court, to defend and protect the rights of the infant, and he

¹ *Smith v. Race*, 27 Ill. 386; *Mason v. Wait*, 4 Scam. 127.

² *Ibid.*

³ 27 Ill. 387, 392, 393.

⁴ *Ex parte Cousins*, 5 Greenl. 240.

⁵ *Ibid.*

is not to be appointed until after service on the infant. So, likewise, if the proceeding be one in which the legal guardian of the infant is personally interested. An order and sale without such precautions will be void.¹

And in no case, under such proceedings, should the guardian *ad litem* be one who is nominated or suggested by any one of the parties adversely interested to the infant, or concerned in prosecuting the proceedings.

§ 386. In Alabama a minor's lands were sold in probate for re-investment, by order of a confederate court, and sold for confederate funds and the funds invested in confederate bonds. The sale was set aside on the grounds that there was not only no payment, in law, but that there was a want of authority to sell for confederate money. This, too, as against a purchaser chargeable with notice or knowledge of the circumstances.² For although the proceedings of such courts are not held to be absolutely void, yet such sales will be set aside on application.³

§ 387. But where jurisdiction has attached, the sale can not be avoided for mere error or irregularity on collateral inquiry.⁴ But orders of sales, and sales thereon, made without such jurisdiction, are void, and will be so treated on application of the proper parties, or when legally brought in question.⁵

§ 388. A deed of warranty executed by a guardian for his ward's lands, made under decree of the court and sale thereon, carries only such title as the ward has at the time. Such warranty binds the guardian in his individual capacity.⁶

§ 389. To sustain a guardian's sale of his ward's real estate the authority of the guardian to sell must first be shown, by production of the decree or license of the court, or such exem-

¹ *McAllister v. Moye*, 30 Miss. 258, 263.

² *Coster v. Barrett*, 49 Ala. 196; *Hale v. Huston, Sims & Co.*, 44 Ala. 134; *Pond v. Scott*, 44 Ala. 241.

³ *Green's Admir. v. Scarborough*, 49 Ala. 137; *Clark v. Bernstein*, 49 Ala. 596.

⁴ *DeBardelaben v. Stoudenmire*, 48 Ala. 643; *Spragins v. Taylor*, 48 Ala. 520; *Downin v. Sprecher*, 35 Me. 474; *Dorsey's Lessee v. Garey*, 30 Md. 490; *Cockey v. Cole*, 28 Md. 276; *Schley's Lessee v. The Mayor, etc., of Baltimore*, 29 Md. 34; *Elliott v. Knott*, 14 Md. 121; *Jackson v. Delancy*, 13 John. 549; *Speer v. Sample*, 4 Watts, 369.

⁵ *DeBardelaben v. Stoudenmire*, 48 Ala. 464; *Spragins v. Taylor*, 48 Ala. 520.

⁶ *Young v. Lorain*, 11 Ill. 624.

plification as may be proof thereof, before the deed can be given in evidence. He can not sell without such order.¹

§ 390. A sale and conveyance of the whole interest nominally, of lands, by order in probate on application of the guardian of one only of several owners, carries title to the share represented by the ward of such guardian, and to no more. The proceedings do not affect the interest of the other owners.²

§ 391. The guardian in *socage* has no power to sell his ward's real estate under order in probate, after the ward attains the age at which such guardianship terminates by law. A sale made after the termination of such guardianship is void, and confers no rights whatever on the purchaser.³

§ 392. If the ward after attaining his majority receive the proceeds of a sale of his real estate made by his guardian during his minority, under order of court, the same being its full value, it is an affirmance of the sale, even though the guardian be the purchaser, if received with proper knowledge of all the circumstances; but such reception of the purchase money will be construed so as not to prejudice the ward, if it appear that he acted without due precaution or proper knowledge, or was influenced by threats.⁴

§ 393. The general rule is that a guardian or other person selling in the relation of trustee can not purchase at his own sale. He can not blend the characters of both seller and buyer so as to unite them in himself.

§ 394. Where neither the law nor the order of sale expressly require a report to be made at the first term after granting the order, but the law being silent on the subject and the order merely requiring a report to the next term of the court, it will be construed to mean the next term after the consummation of the sale. And if by law no confirmation of the sale, or approval thereof, or of the deed, be required, then no such approval or confirmation is necessary to the validity of the sale, especially after great lapse of time. Nor will the failure of the guardian to comply with the order of court in making report of the sale, under such circumstances and law, invalidate the sale, when neither the law nor the order of court make its validity dependent

¹ Jackson *v.* Todd, 25 N. J. 121.

² Bryan *v.* Manning, 6 Jones, Law, (N. C.) 334.

³ Perry's Lessee *v.* Brainard, 11 Ohio, 442.

⁴ Scott *v.* Freeland, 15 Miss. 409; Michoud *v.* Girod, 4 How. 503, 553.

on such subsequent act of the guardian. "To hold the title of the purchaser (say the court) dependent upon the return and report of the guardian, is to hold him responsible for a matter over which he has no control. He can look to the order of court and see whether there is authority to sell, and if so, how far that authority is restricted; but when he sees an order, and that the terms upon which the power to sell depends have been complied with, he is not responsible for the subsequent misconduct of the guardian. His title can not and ought not to be invalidated by matters happening subsequent to its vesting. We might as well require him to see to the application of the purchase money. Undoubtedly where a title can not be consummated without certain acts being done, and an approval of the court of those acts the case is different. The sales of administrators under the statute are of this character. But no provision is made in the guardian law of 1825 to secure the supervision of the court over the sale; none which looks to an approval by the court, as a preliminary to the purchaser's title."¹

§ 395. A decree in probate for the sale of a ward's lands to raise a certain amount of money is necessarily to be construed to mean that amount and the costs.²

And if a larger sum be raised by such sale than the decree calls for or allows, and the sale be made in parcels, yet the illegality will not affect the sale of those parcels that were sold before the aggregate of the proceeds amounted to an excess of the sum to be raised.³

§ 396. If the lands are sold in different order than that directed in the license or decree, the defect, if it be one, is cured by the action of the court in confirming the sale, for, in the language of the Supreme Court of Wisconsin, "the same court from which the order emanated had in its discretion the power to modify it or to dispense with its strict performance in the particular named. This was done by the order of confirmation."⁴

§ 397. The notice for the sale of a minor's lands must conform to the order or decree of sale, and the sale must be made in

¹ Robert *v.* Casey, 25 Mo. 584.

² Emery *v.* Vroman, 19 Wis. 689, 700.

³ Ibid.

⁴ Ibid.

accordance with the notice, so far at least as substantial rights and matters are concerned, or else the sale will be void; and even confirmation of the sale thus unauthorizedly made will not cure the defect and restore validity.¹

§ 398. The power to sell the property of those who, from infancy or other cause, have no capacity to be heard or to act for themselves, is a very grave one and is to be exercised with great caution.² But it is a necessary one and is, in every well regulated State, vested in some suitable tribunal; and hence judicial sales are not to be brought into disrepute and titles thereon held in slight regard or confidence, by vacating such sales, or decrees for such sales, for trivial causes not substantially affecting jurisdiction.³ And if the purchase money be lost by reason of mismanagement of the court or of its officer, the loss is not to fall upon the purchaser or to affect his title to the property.⁴ Hence it is held, in Virginia, that a purchaser at judicial sale is not required, for his own security, to look behind the decree, if there is jurisdiction in the court, to see for himself the truthfulness of the alleged grounds of sale.⁵

And that though the sale be made for confederate funds, if it be reported to the court, and by the court be confirmed, and the payment be made as directed by the decree, and a conveyance of the land be made, the purchaser will not be required to repeat the payment or pay in good money. Such confirmation, until set aside, is valid in a collateral proceeding, and also justifies the commissioner in selling.⁶ And the selling for such funds is no cause for setting the sale aside, if the decree so direct and the sale be so made by consent of the creditors for whose benefit the sale is made, and who, consenting to such decree and sale, also agree to receive that description of funds, for such sale is for the advantage of the debtor, and the other party having consented are not permitted to object after confirmation of the sale.⁷

So, if the party to whom the proceeds of the sale are coming

¹ Cofer *v.* Miller, 7 Bush, 545; Hahn *v.* Pindell, 1 Bush, 538; Jarbo *v.* Colvin, 4 Bush, 70.

² Durrett *v.* Davis, 24 Gratt. 302, 317.

³ Ibid.

⁴ Ibid.

⁵ Durrett *v.* Davis, supra; Walker's Exr. *v.* Page, 21 Gratt. 636.

⁶ Mead *v.* Jones, 24 Gratt. 347.

⁷ Crawford *v.* Weller, 23 Gratt. 885.

accepts such funds, he thereby elects to affirm the sale, if done with full knowledge, and is estopped to deny its validity.¹ But if the sale is made as an entirety and is avoided by some of those for whose benefit it is made refusing to accept the description of funds improperly received by the officer or persons selling, this will avoid the sale as to all others for whose benefit it is made, and a resale will be ordered of the whole property and interest, as also for the like benefit of all those entitled originally to the proceeds, and they will take the same in proportion to their interests irrespective of their prior acts of affirmation.² The practice, in Virginia, is (and such, too, is the better practice, we conceive,) to start the resale at an upset price to be fixed by the court as a protection to the parties in interest.³

II. SALES IN PROCEEDINGS FOR PARTITION.

§ 399. Sales of land by order of the court in proceedings for partition are judicial sales.⁴ As such they must be reported to the court for confirmation, and until confirmed they are of no effect.⁵

§ 400. On failure of the purchaser to comply with the terms of sale, if the land be re-sold by order of the court, and sell for a less price than at first, the original owner, or the commissioners selling, may sue for and recover of the first purchaser the loss on the re-sale.⁶

§ 401. A court of equity may partition part in kind and sell other parts of lands as may seem for the best interests of the parties.⁷

§ 402. The purchaser under a sale in partition takes a conclusive title against the parties to the suit,⁸ and against their grantees, by conveyance, made during the proceedings.⁹

¹ *Howery v. Helms*, 20 Gratt. 1.

² *Supra*.

³ *Supra*. (But if this be omitted in reselling, it is not a matter which those may object to, who by their acts attempted to affirm the previous sale. *Ibid.*)

⁴ *Hutton v. Williams*, 35 Ala. 503.

⁵ *Ibid.*; *Hess v. Voss*, 52 Ill. 472.

⁶ *Hutton v. Williams*, *supra*.

⁷ *Haywood v. Judson*, 4 Barb. 228.

⁸ *Gates v. Irick*, 2 Rich. L. 593; *Allen v. Gault*, 27 Penn. St. 473.

⁹ *Baird v. Corwin*, 17 Penn. St. 463; *Michoud v. Girod*, 4 How. 503, 559; *Davoue v. Fanning*, 2 Johns. Ch. 252.

But not as against persons in interest, being such at the inception of the proceedings, and who are not made parties thereto.¹ Thus, a partition among several coparceners, the interest of one of whom has passed to an execution purchaser, will not bind such purchaser, unless he be made a party thereto.² Nor will a sale in partition cut off the dower of a married woman, not made a party, although her husband be made such.³

§ 403. If, while proceedings are pending for the partition of lands held in common, a creditor of one of the tenants in common obtain a judgment against his debtor, the creditor so obtaining judgment has no other or better right than has his debtor in the subject matter of the proceeding, and can not require the sale in partition to be made for cash, so as to meet the cash demands of his judgment.⁴ And so in Illinois, the lien of a mortgage given by one of the parties to the partition proceedings during the pendency of such proceedings, follows the interest when set off to the party giving the mortgage.⁵

§ 404. In Illinois, it has been held that in sales in partition under the statute, proof of the notice of sale should be filed and made to appear in the proceedings, with a copy of the notice;⁶ but, in the same State, in partition sales in the ordinary court of chancery, it is held that the chancery court need not, as it does not proceed under the statute, conform to the statute in this respect.⁷

§ 405. In sales in proceedings for partition, all persons in interest, including lien holders against the property, and holders of liens against separate shares or interests, are, in Illinois, required to be made parties, and that, too, whether the interest be a present and certain, or a contingent one. Thus, having before it the parties in interest, both as coparceners and creditors, the court will then declare the rights and interest of each of the parties, and make such decree as will protect the same. The

¹ *Whiting v. Butler*, 29 Mich. 122, 126.

² *Ibid.*

³ *Greiner v. Klein*, 28 Mich. 12; *Wilkinson v. Parish*, 3 Paige Ch. 653; *Jackson v. Edwards*, 22 Wend. 498. And when the wife is a party, the court should protect her rights as to proceeds of sale. *Jackson v. Edwards*, 7 Paige, Ch. 386.

⁴ *Stern v. Epstein*, 14 Rich. Eq. 5; *Cradlebaugh v. Pritchett*, 8 Ohio St. 646.

⁵ *Loomis v. Riley*, 24 Ill. 307; *Manly v. Pettee*, 38 Ill. 128, 133.

⁶ *Hess v. Voss*, 52 Ill. 472, 479; *Tibbs v. Allen*, 29 Ill. 535.

⁷ *Hess v. Voss*, *supra*.

money arising from the sale should be brought into court and applied, by the order of the court, where it belongs, and the several liens should be displaced and replaced by their several shares of the funds arising from the sale, and the residue distributed to the proper owners, so as to dispose of the whole matter, and give the purchaser a clear title.¹

§ 406. But a prior judgment lien is not, in South Carolina, affected or cut off by a commissioner's sale of lands in proceedings for partition among heirs at law of a decedent; nor will the plaintiff in the judgment be turned over to the personal effects of the estate unadministered and uncertain in character, an amount sufficient to pay the judgment debt, yet less ready of affording a remedy by satisfaction of the judgment. Therefore an injunction will not be sustained to prevent the execution and sale of the land by the judgment creditor under such circumstances, or, if granted temporarily, will, upon further hearing, be dissolved.²

§ 407. Decrees of sales in partition should not only ascertain and declare the relative rights or interests of the parties, and give such judgment as may sustain the same, but should describe the land to be sold, and the sale of land not included in the order of sale, although included in the application, is error. If there be minors interested in the suit they must be made parties by process and actual service. The better authority is that the appointment of a guardian *ad litem* to defend for them without such prior process and service is unauthorized and is error, for which a decree will be reversed, as is also the omission to find the several relative interests, and also the selling of lands not described in the decree. For such sale of lands not decreed to be sold, and for proceeding without making the minors parties, the sale, it is believed, though affirmed, will be void.³

§ 408. In Ohio, sales in proceedings for partition do not carry to the purchaser the growing crops situate upon the premises. The court say: "Sales made in partition are subject to regulations entirely similar to those which govern sales on ordinary execution. The lands must be appraised, and can not be sold for less than two-thirds of their appraised value; and the same con-

¹ Kilgour *v.* Crawford, 51 Ill. 249.

² Moore *v.* Wright, 14 Rich. Eq. 132.

³ Hickinbotham *v.* Blackledge, 54 Ill. 316, 318.

siderations which forbid us to hold that the growing crops pass to the purchaser in the one case, forbid it in the other."¹ In *Houts v. Showalter* the court say, BRINKERHOFF, Justice: "When an appraisement is made, it can not be foreseen when a sale will be effected. It is not for the interest of any party, nor for the public interest, that the land should thenceforth lie waste; then there may have been no crop sown or planted, but when the sale comes to be made there may be growing crops put into the ground in the meantime. If these passed by the sale it would be unjust to the debtor, for they could not have been valued."

§ 409. Thus it is that in Ohio, although in partition sales no interest of a debtor is involved, yet, as the statute of that State requires appraisement in partition sales as in sales on execution, it follows that the same objection arises in the one case as in the other to allowing the growing crops to pass by the sale. That is the impracticability of fixing their valuation, while without valuation they can not, with the realty, be sold.²

§ 410. In Tennessee, when the proceedings are in partition, the legal guardian may defend for minor defendants, and they themselves need not be personally sued or brought into court by personal service; his appearance for them places them in court, and gives jurisdiction of their persons, so that the decree in that respect is not invalid for want of personal service on the ward.³

And in such case the fact that the complainant's solicitor writes the answer of the guardian, is not, if the guardian has sworn to it, in itself sufficient cause to avoid the sale, but may on the ground of alleged fraud, in connection with other circumstances, if as a whole they raise a presumption of unfairness either in fact or in law.⁴ But if the appearance and answer is by guardian *ad litem* merely, and without service on the infant, then the sale is not merely voidable, but is absolutely void. *Ivey v. Ingram*, 4 Cold. 129.

§ 411. In Connecticut, the probate court has not jurisdiction to order the sale of real estate merely because of the difficulty of making partition.⁵

¹ *Houts v. Showalter*, 10 Ohio St. 124, 127; *Cassilly v. Rhodes*, 12 Ohio, 88.

² *Houts v. Showalter*, *supra*.

³ *Cowan v. Anderson*, 7 Cold. 284.

⁴ *Ibid.*

⁵ *Ford v. Kirk*, 41 Conn. 9.

By statute, chapter 43, of acts of 1866, the jurisdiction in such cases is vested in the superior court.¹ It is there held that though the court has the power to make such sales, it should be exercised with much caution, and that the compulsory sale of property without the owner's consent is an extreme exercise of power, warranted only in clear cases in which such sale will better promote the interest of the parties than will a partition.² But in such case, the court must take into consideration the interest of all the parties.³

§ 412. Sales in partition estop infants from contesting title who receive the proceeds after arrival at maturity. But not as to the accuracy of the amount treated and received as coming to them.⁴

¹ *Ford v. Kirk*, 41 Conn. 9.

² *Ibid.*

³ *Ibid.*

⁴ *Young v. McKinnie*, 5 Fla. 542.

CHAPTER VII.

PURCHASES BY PERSONS CONCERNED IN SELLING.

§ 413. The policy of the law forbids, as conducive to fraud and inimical to fair dealing, the purchase by masters, trustees, executors, administrators, guardians, and all others, at their own sales, as also all agents, public and private, who are concerned in selling, whether such purchase be direct or indirect; and if made, such sales will be set aside on application of the parties interested.¹ When the person selling is willing to give more for the

¹ Lockwood *v.* Mills, 39 Ill. 602; Sheldon *v.* Newton, 3 Ohio St. 494; Torrey *v.* Bank of Orleans, 9 Paige, 649; Kruse *v.* Steffens, 47 Ill. 112; Michoud *v.* Girod, 4 How. 503; Wormley *v.* Wormley, 8 Wheat. 421; Davoue *v.* Fanning, 2 Johns. Ch. 252; Church *v.* Marine Ins. Co., 1 Mason C. C. 341, 345; Remick *v.* Butterfield, 31 N. H. 70; Richardson *v.* Jones, 3 Gill. & J. 163; Ward *v.* Smith, 3 Sandf. Ch. 592; Dobson *v.* Racey, 3 Sandf. Ch. 60; Haddix *v.* Haddix, 5 Litt. 202; Dorsey *v.* Dorsey, 3 Har. & J. 410; Davis *v.* Simpson, 5 Har. & J. 147; Case *v.* Abeel, 1 Paige, 393; DeCaters *v.* DeChaumont, 3 Paige, 178; Puzyer *v.* Senier, 9 Wis. 370; Iddings *v.* Bruen, 4 Sandf. Ch. 223; Field *v.* Arrowsmith, 3 Humph. 442; Wilson *v.* Troup, 2 Cow. 196; McCants *v.* Bee, 1 McCord, Ch. 222, 226; Britton *v.* Johnson, 2 Hill Eq. (S. C.) 430; Saltmarsh *v.* Beene, 4 Porter, 283; Miles *v.* Wheeler, 43 Ill. 123; Harris *v.* Parker, 41 Ala. 604; Roberts *v.* Fleming, 53 Ill. 193; Griffin *v.* Marine Co., 52 Ill. 130; Pensonneau *v.* Bleakley, 14 Ill. 15; Terrill *v.* Auchauer, 14 Ohio St. 80; Swayze *v.* Burke, 12 Pet. 11; Robbins *v.* Butler, 24 Ill. 387; Dennis *v.* McCagg, 32 Ill. 429; Forbs *v.* Halsey, 26 N. Y. 53; Barrington *v.* Alexander, 6 Ohio St. 189; Mitchel *v.* Dunlap, 10 Ohio, 117; Glass *v.* Greathouse, 20 Ohio, 503; Rice *v.* Cleghorn, 21 Ind. 80; Hoffman *v.* Harrington, 28 Mich. 90. (In Michigan, such sales are declared void by statute. *Ibid.* In the case last cited the sale was so held as against a subsequent *bona fide* purchaser, but by a divided court.) Nelson *v.* Hayner, 66 Ill. 487; McCready *v.* Mier, 64 Ill. 495; Coat *v.* Coat, 63 Ill. 73; Williams *v.* Walker, 62 Ill. 517; Case *v.* Carroll, 35 N. Y. 385; Walker *v.* Walker, 101 Mass. 169; Ives *v.* Ashley, 97 Mass. 198; Stinson *v.* Sumner, 9 Mass. 143; Estate of Millenovich, 5 Nev. 161; Cunningham's Admr. *v.* Rogers, 14 Ala. 147; Charles *v.* Dubose, 29 Ala. 371; Andrews *v.* Hobson's Admr. 23 Ala. 219. In Kruse *v.* Steffens, the Supreme Court of Illinois lay down the law on this subject in the following terms: "As a general rule, a person acting in a fiduciary capacity can not be permitted to purchase property at his own sale. And in such case it does not matter whether the purchase is in the name of the person conducting the sale or in the name of another for his use. McConnel *v.* Gibson, 12 Ill. 128. And in such a sale, even where there is no fraud, the sale will be set aside if the

property than any one else, he should apply to the court for leave to become a purchaser. The court, in their discretion, may permit it.¹

§ 414. The Supreme Court of the United States hold that all such sales are "fraudulent and void, and may be so declared."² They say: "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private." That "it therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is selling or buying on his own account, are directly conflicting with those of the person on whose account he buys or sells." That "he can not be at the same time vendor and vendee." And "that no rule is better settled than that a trustee can not become a purchaser of the trust estate."³

party in interest shall apply in a reasonable time for that purpose. *Thorp v. McCullum*, 1 Gilm. 627. The fact that the person entrusted by the law to make the sale becomes the purchaser, whether by direct or indirect means, creates such a presumption of fraud as requires the sale to be vacated if application is made in proper time. * * * * This rule is regarded as firmly established by this court, and it is deemed unnecessary to review authorities or to discuss the reason of the rule." 47 Ill. 114, 115. In *Lockwood v. Mills*, 39 Ill. 602, the same court assert the rule as follows: "The evidence shows that Green was creditor, administrator, auctioneer and purchaser at the sale, thus having it in his power to strike down the property at his own price, and we see as the result of representing all these relations to the estate that nine hundred and sixty acres of land were sold for the sum of \$1,134. The evidence shows the land embraced in the deed to Lockwood worth from six to ten dollars per acre. If they were worth eight dollars per acre, that would give \$3,840, while they sold but for \$600; and if the whole nine hundred and sixty acres were worth the same per acre, their value would be \$7,680, and they only brought \$1,134. A large compensation for acting as creditor, administrator, crier and purchaser at his own sale. The rule is well established in equity, that the simple fact of the purchase by assignees, trustees, commissioners, executors, or administrators, at their own sales, renders the sales invalid, and it will be set aside by the court." P. 608.

¹ *Michoud v. Girod*, 4 How. 558; *Armor v. Cochrane*, 66 Penn. St. 308, 311. He should report the bid and apply for leave to give more. *Davoue v. Fanning*, 2 Johns. Ch. 252, 261.

² *Michoud v. Girod*, 4 How. 503, 553.

³ *Michoud v. Girod*, supra. See also *Wormley v. Wormley*, 8 Wheat, 421.

§ 415. "An executor or administrator is in equity a trustee for heirs, legatees, and creditors."¹ "*Davoue v. Fanning*" was the case of an executor for whose wife a purchase was made by one Hedden at public auction *bona fide*, for a fair price, of a part of the estate which Fanning administered, and the prayer of the bill was that the purchase might be set aside and the premises re-sold. The case was examined with special reference to the right of an executor to buy any part of the estate of his testator. And it was affirmed, and we think rightly, that if a trustee or person acting for others, sells the trust estate and becomes himself interested in the purchase, the *cestuis que trust* are entitled, as of course, to have the purchase set aside and the property re-exposed to sale under the direction of the court. And it makes no difference in the application of the rule that a sale was at public auction, *bona fide* and for a fair price, and that the executor did not purchase for himself, but that a third person, by previous arrangement with the executor, became the purchaser to hold in trust for the separate use and benefit of the wife of the executor who was one of the *cestuis que trust*, and who had an interest in the land under the will of the testator. The inquiry in such case is not whether there was or was not fraud in fact. The purchase is void and will be set aside at the instance of the *cestuis que trust* and a re-sale ordered on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court. We are aware that cases may be found in the reports of some of the chancery courts in the United States, in which it has been held that an executor may purchase, if it be without fraud, property of his testator, at open and public sale for a fair price, and that such purchase is only voidable and not void as we hold it to be. But with all due respect for the learned judges who have so decided, we say that an executor is in equity a trustee for the next of kin, legatees and creditors, and that we have been unable to find any one well considered decision with other cases, or any one case in the books to sustain the right of an executor to become the purchaser of the property which he represents or any portion of it, though he has done so for a fair price, without fraud, at a public sale."² And again, in the same case, as if to put aside all ques-

¹ *Michoud v. Girod*, 4 How. 556, 557.

² *Michoud v. Girod*, *supra*.

tions in reference to the generality of the doctrine asserted by it, the court say: "We have thus shown that those purchases are fraudulent and void from having been made *per inter positam personam*, and if they were not so on that account, that they are void by the rule in equity in the courts of England, and as it prevails in the courts of equity in the United States."

"The rule as expressed embraces every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the person with whom he is dealing, or on whose account he is acting and his own individual interest." It is the same whether the sale be made with or without the sanction of judicial authority, where the person selling represents that in which others are interested; and releases by those in interest made in ignorance of the circumstances will not bind them.¹

§ 416. In some of the State courts such purchases are regarded as conveying the legal title in trust for those interested in the estate sold, yet so far void in equity that they will be set aside at the instance of the *cestuis que trust*, without other cause than the single fact of the purchase being by or for the trustee or person selling.²

In others it is held that although it is thus held in trust and the sale is liable to be set aside as against the purchaser, within a reasonable time, that such sale is valid in favor of a *bona fide* purchaser under him before avoidance and without notice of his thus having purchased at his own sale.³ But if the principle that a grantee is bound by the recitals contained in the title deed of his grantor is applicable to these sales, it is difficult to conceive by what rule of law there may be *bona fide* purchasers, under such circumstances, except where the trust is a secret one.⁴

In yet another class of decisions, though the legal title is sup-

¹ *Michoud v. Girod*, 4 How. 503, 553, 559; *Roberts v. Fleming*, 53 Ill. 196; *Barrington v. Alexander*, 6 Ohio St. 189.

² *Davoue v. Fanning*, 2 Johns. Ch. 252; *Doe, d. Harkrider v. Harvey*, 3 Ind. 104, 105; *Glass v. Greathouse*, 20 Ohio, 503; *Shaw v. Swift*, 1 Ind. 565; *Brackenridge v. Holland*, 2 Blackf. 377; *Terrill v. Auchauer*, 14 Ohio St. 80. In Ohio an appraiser of the property in probate sales is prohibited to bid by statute. *Ibid.* *Barrington v. Alexander*, 6 Ohio St. 189.

³ *Wyman v. Hooper*, 2 Gray, 141; *Blood v. Hayman*, 13 Met. 231; *Robbins v. Bates*, 4 Cush. 104, 106.

⁴ *Brush v. Ware*, 15 Pet. 93, 111, 112, 113; *Reeder v. Barr*, 4 Ohio, 446, 458; *Willis v. Bucher*, 2 Binn, 455; *Jackson v. Neely*, 10 Johns. 374; *Wormley v. Wormley*, 8 Wheat. 421.

posed to pass by the sale and conveyance, and though it is not expressly held that the title is thus held by the grantee in trust for his *cestuis que trust*, yet it is held that such sales are void in equity at the election of those interested in the property sold, and will, within a reasonable time, on their application, be set aside.¹

And it is further held in some of these cases that if, on a resale, the property should not sell for as much as before, those interested therein may elect to affirm the first sale and hold the trustee to his bargain.

§ 417. It matters not, so far as the equitable effect is involved, whether the purchase be made directly by and in the name of the trustee or indirectly in the name and through the intervention of another person.² In the case of *Miles v. Wheeler*, the lands of infant heirs being sold in probate by the administrator were fraudulently purchased for himself through the agency of another person as bidder. The sale was in 1844. The administrator occupied the premises until his death, which occurred in 1859. In 1861 the heirs whose property had thus been fraudulently sold filed their bill in equity for a conveyance of the property and for an account of rents and profits against the devisees of the deceased administrator or fraudulent purchaser. Notwithstanding the lapse of time which had intervened it was held that they were entitled to relief.³

§ 418. An administrator, who was also one of the heirs, confessed judgment against the estate, and suffered the lands to be sold on execution, the purchaser being the attorney of the plaintiff, and openly avowing at the sale that he was buying merely to secure the debt, and afterward, without making any payment, deeded the land for the amount bid to the administrator in his personal right, receipting the same after making such deed on the execution, was held not to be a *bona fide* purchaser, and it was also held that the deed to the administrator from the execution purchaser was not a *bona fide* conveyance as against the other heirs. The Supreme Court of the United States use the

¹ *Shaw v. Swift*, 1 Ind. 565; *Remick v. Butterfield*, 31 N. H. 70; *Wyman v. Hooper*, 2 Gray, 141; *Jackson v. Van Dalsen*, 5 Johns. 44; *Blood v. Hayman*, 13 Met. 231; *Hoskins v. Wilson*, 4 Dev. & Batt. 243; *Beeson v. Beeson*, 9 Penn. 279.

² *Church v. Marine Ins. Co.*, 1 Mason C. C. 341; *Miles v. Wheeler*, 43 Ill. 123.

³ 43 Ill. 123.

following language in disposing of the case: "In making the purchase Ross (the attorney) seems in effect to have acted as the agent of the administrator, and it was proper for the jury to inquire whether the transaction was not fraudulent. If the administrator suffered the land to be sold through the agency of Ross with the view of securing the title to himself, to the exclusion of the other heirs of his father, the proceeding was fraudulent and void; and Ross could not be considered a *bona fide* purchaser against the legal and equitable rights of the plaintiffs, he not having paid the purchase money, the deed which he executed to Ormsley (the administrator) is not a *bona fide* conveyance."¹

§ 419. The two opposite characters of seller and purchaser can not be united in the same person, unless by the permission of the court first obtained;² hence, a trustee, commissioner to sell, executor, administrator, guardian, or other person selling or conducting the sale, are incapable of purchasing at their own sales; sales so made to themselves are held by the Supreme Court of the United States to be void. The court say: "We are aware that cases may be found in which it has been held that an executor may purchase, if it be without fraud, any property of his testator at an open and public sale, for a fair price, and that such purchase is only voidable and not void, as we hold it to be."³ The court considers such sales as absolutely void.

§ 420. In Massachusetts, it is held that they are not so absolutely void as to be so held at the instance of a stranger, but will be so held only on application of those affected by the sale; and in no case, at the instance of either, in collateral proceedings at law, unless fraud in fact be shown.⁴

§ 421. Purchases by a third party, for the benefit of the administrator who sells, will, as we have seen,⁵ be set aside if

¹ *Swayze v. Burke*, 12 Pet. 11. In this case the attorney, when he bid in the lands, declared his readiness to allow the heirs to redeem, and that the only object of the purchase was to secure his client's debt.

² *Michoud v. Girod*, 4 How. 503, 557. But in a subsequent case of *Stephens v. Beall*, the United States Supreme Court held that a conveyance by the purchaser to the trustee who sold, made thirteen years after the sale, does not in itself, after so great a lapse of time, raise a presumption of fraud; that fraud, after so long a time, becomes then a question of *fact*; must be proven otherwise than by those appearing on the face of the case. 22 Wall. 329.

³ *Michoud v. Girod*, 4 How. 503, 557.

⁴ *Yeackel v. Litchfield*, 13 Allen, 417.

⁵ *Sypher v. McHenry*, 18 Iowa, 232.

the property still remains in the purchaser, or administrator, or others, with notice; but if transferred to *bona fide* purchasers, so that such innocent ones be protected in their title thereto, equity will hold the administrator and purchaser at his sale accountable therefor.¹

§ 422. And so, where one sold lands as the administrator of his wife's estate, under proceedings otherwise regular, and the purchaser at such sale conveys the premises purchased to the person thus selling, for a nominal consideration, the sale, though not absolutely void, is *voidable* at the option of those in interest if timely objection is made.² Nor may an administrator or executor buy the lands of his intestate or testate at a sale by a trustee under a trust deed; if he does, he will hold the property in trust for the creditors and heirs. He can not be permitted to speculate in the subject matter confided to his own care in his fiduciary relation of executor or administrator, but will rather be regarded in equity as buying for the benefit of the estate, unless the contrary appears; and if so appearing, it will not be sustained. The purchaser will have no better *status* in court than if made by himself at a sale of his own or the decedent's property. In short, all such relations are regarded as mere trusts for the benefit of those interested, and will be so treated, or else the sale will be set aside.³

§ 423. And so, one buying lands of a widow and heirs on a credit, time of payment being declared of the essence of the contract, becomes, upon failure to pay, a trustee for the grantors; if he sells, he sells for their benefit, and if to cover up the deficiency of title he procures the same lands to be sold judicially, or under execution, as the case may be, with an understanding that his purchaser should buy thereat, and be credited with the additional price thereby incurred upon the amount payable on his private purchase, equity will hold the trustee accountable for the additional price to the rightful owners, the same as if actually received by such derelict trustee. If such trustee be the administrator of the estate to which the original vendors are heirs, then he will be surcharged for such liability on his accounts

¹ Read *v. Howe*, 39 Iowa, 553, 561.

² Mitchel *v. McMullen*, 59 Mo. 252, 255, 256.

³ Harper *v. Mansfield*, 58 Mo. 17.

as administrator, and those entitled to the proceeds will not be turned over to an original suit to obtain the same.¹

§ 424. And where a guardian of a minor sold the estate of the ward under a license in probate, and the same was purchased by her attorney, but without her knowledge at the time, and without any pre-arrangement or understanding between them, and the property was afterwards conveyed to the guardian by the purchaser, no money being paid on account of his purchase, or to him for the conveyance, it was held that the sale was not *void*, but was *voidable*, at the option of the heirs,² and the guardian was compelled to convey to one of them the share of such one, on suit brought for that purpose, and to account for the rents and profits of the property.³ In such case, however, the heir thus repudiating the sale takes the property, subject to whatever burdens existed against it before. He can not avoid the sale, and at the same time claim to enforce it, as against liens previously existing against the property. On thus casting off the sale, the property and title reverts to its original condition prior to the sale, and is subject to the widow's dowry, although she be the guardian who participated in the transaction by receiving the conveyance, and that far treated the sale as valid. So, likewise, in regard to pre-existing mortgages or other liens. Although a valid sale might have cut them off and subrogated them to the proceeds, yet on thus avoiding the sale they are reinstated, and the heir takes subject thereto, and to what has been paid for repairs, insurance, taxes and interest on liens.⁴

§ 425. In Nevada the same rule prevails. An administrator, or other person acting in a fiduciary capacity in selling, can not buy at his own sale—can not buy of himself—as a general principle.⁵ But the case cited from Nevada being one involving *personal* property, and the administrator having paid full value for it, and accounted accordingly in a settlement with the court, the sale was permitted to stand, as a matter of interest to the

¹ Parshall's Appeal, 65 Penn. St. 224.

² Walker *v.* Walker, 101 Mass. 169. (And so of an administrator's purchase through a third person. Ives *v.* Ashley, 97 Mass. 198.)

³ Walker *v.* Walker, *supra*.

⁴ Walker *v.* Walker, *supra*; Stinson *v.* Sumner, 9 Mass. 143; Robinson *v.* Bates, 3 Met. 40.

⁵ Estate of Miilenovich, 5 Nevada, 161.

estate, inasmuch as the court considered it for the interest of the estate that the sale should be acquiesced in.¹

§ 426. And though in Alabama the general rule is that the person selling may not buy,² yet it is there held, also, that if he has an interest in the property or estate which is being sold, then he may buy, if for a fair and equivalent price.³

¹ Estate of Millenovich, 5 Nevada, 161.

² Cunningham, Admr. v. Rogers, 14 Ala. 147; Charles v. Dubose, 29 Ala. 867, 371; Andrews v. Hobson, Admr., 23 Ala. 219

³ Frazier's Exr. v. Lee, 42 Ala. 25; Saltmarsh v. Beene, 4 Porter, 283; McLain v. Spence, Admr., 6 Ala. 894; McCartney v. Calhoun, 17 Ala. 301; Payne v. Turner, 86 Ala. 623.

CHAPTER VIII.

THE DEED FOR LANDS SOLD AT JUDICIAL SALES.

- I. BY WHOM TO BE MADE.
- II. TO WHOM TO BE MADE.
- III. WHEN TO BE MADE.
- IV. ITS RECITALS AND DESCRIPTIONS.
- V. WHAT PASSES BY IT.

I. BY WHOM TO BE MADE.

§ 427. Although the sale, in a popular point of view, is supposed to have been made when the bargain is closed, yet, in a legal sense, the sale is not complete until the deed is delivered.¹ Therefore, it follows that as the making of the deed is part of the act of selling, the person appointed to sell is the only one who can make the deed. The sale is not perfected until confirmation thereof and delivery of the deed; and in some cases, as where approval of the deed by the court is also required, then only by the additional act of approval.²

§ 428. A contrary doctrine is alleged by Justice CATON, in *Jackson v. Warren*,³ to exist in Illinois. The Judge treats the subject as follows; "In England the practice is to keep the biddings open at a master's sale, so that any person may advance on a bid received by the master, which he reports to the court, so, until a final confirmation of the sale, no one can be considered as a purchaser, but a mere bidder; but under our practice at such sales, a valid and binding contract of sale is made when the hammer falls. In the absence of fraud, mistake, or some illegal practices, the purchaser is entitled to a deed on the payment of

¹ *Macy v. Raymond*, 9 Pick. 285; *Leschey v. Gardner*, 3 W. & Sergt. 314; 2 Daniel Ch. 1274 et seq.; *Rawlings v. Bailey*, 15 Ill. 178; *Blossom v. R. R. Co.*, 3 Wall. 207; *Childress v. Hurt*, 2 Swan, 487; *Robinson's Appeal*, 62 Penn. St. 216; *Wallace v. Hall*, 19 Ala. 367; *Koehler v. Ball*, 2 Kansas, 160; *Vallee v. Fleming*, 19 Mo. 454; *Williamson v. Berry*, 8 How. 496.

² *Macy v. Raymond*, 9 Pick. 285; *Rawlings v. Bailey*, 15 Ill. 178; *Young v. Keogh*, 11 Ill. 642; *Ayers v. Baumgarten*, 15 Ill. 444; *Blossom v. R. R. Co.*, 3 Wall. 205.

³ 32 Ill. 331.

the money." This decision, so far as relates to the binding effect of the sale at the fall of the hammer seems to be in direct conflict with the previous decisions in that State of *Young v. Keogh*, and *Rawlings v. Bailey*, as also the subsequent decision of *Dills v. Jasper*, and the *Quincy Seminary v. The Same*, wherein the same doctrine is avowed as is laid down by us above.¹

§ 429. Though the English practice of keeping open the biddings at a judicial sale for an advanced bid until confirmation may not, in the States, be the general practice, yet it is believed that, as a general rule, an advanced bid, materially increasing the amount, will either be received by the court, or else cause a resale and reopening of the biddings to be ordered at any time before final confirmation of the sale.²

§ 430. As to the necessity of such confirmation, in some shape or other, there can be no doubt, as a general rule, though

¹ *Young v. Keogh*, 11 Ill. 642; *Rawlings v. Bailey*, 15 Ill. 178; *Dills v. Jasper*, 33 Ill. 262. In the latter case, Justice BECKWITH, delivering the opinion of the court, says: "A master in chancery, exposing property for sale, should receive bids for it and report the largest one to court for its approval. While such is the correct practice, we do not intend to say that if it is not followed we should hold the sale void. If the order upon which he acts contains especial directions in regard to requiring a deposit, they should be followed; but in case no such directions are given, the master may, in his discretion, require a part or the whole of a bid to be deposited with him; or he may entirely dispense with such deposit. A bidder is not allowed to retract his bid after its acceptance by the master, if it is approved by the court within a reasonable time; but a bid, with or without a deposit, although it is accepted by the master, does not become an absolute contract until it is approved by the court. The bidder at such a sale merely agrees to purchase the property upon the terms named by him, if the same are approved by the court; and until the bid is reported, and the report is confirmed, the sale is incomplete, and the bidder is under no obligation to complete the purchase. In this country the master usually requires the amount of the bid to be deposited with him at the time of its acceptance or immediately thereafter; and on failure to do so, the master may reject the bid, and may again expose the property for sale; or he may report the bid to the court, together with the failure of the bidder to make a deposit. The master should not take the responsibility of rejecting a bid after it has been once accepted by him, where there is danger of loss to the parties in so doing, because he may render himself liable for it. After the court has approved of the bid, it may summarily require the bidder to pay the amount thereof, or it may order the property to be resold at the bidder's risk and expense; and if, upon a resale, it does not bring the amount of the bidder's liability, the court may summarily enforce the payment of the difference."

² *Horton v. Horton*, 2 Brad. (N. Y.) 200; *Davis v. Stewart*, 4 Texas, 223; *Hays' Appeal*, 51 Penn. St. 58; *Childress v. Hurt*, 2 Swan, 487; *Wright v. Cantzon*, 31 Miss. 514; *Kain v. Masterton*, 16 N. Y. 174.

the practice may vary in different places; in proceedings in a court of ordinary chancery jurisdiction, usually by formal order of confirmation, if not also by an order approving the deed;¹ and in probate and orphan's courts, whose proceedings are directed by statute, but which also, at the same time, in making sales of real estate, exercise a limited chancery jurisdiction in some States, by mere approval of the deed, but which in all cases must depend upon the local statutory requirement, if there be such, and if not, then confirmation or approval of sale should appear of record in accordance with the general rule, so as in some shape or other to show the approval or confirmation of the act by the court.

§ 431. Where an administrator obtains a license to sell the real estate of a decedent for payment of debts, and dies before the confirmation of the sale, his successor may go on and complete the transaction, if previous proceedings be regular, without any further order of the court for that purpose, just as in case of any other business of the estate.² The license must be considered as inuring to the administrator, or official capacity, and not to the person of him who fills the place of administrator. If the new administrator has doubts, he can apply to the court for instruction, or to a court of equity for relief; but if to the latter, then the heirs must be made parties. Should the new administrator (or administrator *de bonis non*) refuse to proceed, then the purchaser may coerce a deed in chancery, if he has in no way lost his rights as such.

§ 432. On a sale of lands of a decedent by the administrator in probate, the deed to the purchaser can not be executed by the administrator through an agent.³ It is an act that can only be performed by an administrator.

§ 433. If the rightful administrator be within the probate

¹ *Moore v. Titman*, 33 Ill. 358, 367, 369; *Shriver v. Lynn*, 2 How. 43; *Blossom v. R. R. Co.*, 3 Wall. 207; *Vallee v. Fleming*, 19 Mo. 454; *Webster v. Hill*, 8 Sneed, 333; *Henderson v. Herrod*, 23 Miss. 434; *Wallace v. Hall*, 19 Ala. 367; *Robinson's Appeal*, 62 Penn. St. 216; *Hays' Appeal*, 51 Penn. St. 58; *Koehler v. Ball*, 2 Kan. 160; *Gowan v. Jones*, 18 Miss. 164; *Ayers v. Baumgarten*, 15 Ill. 444; *Rawlings v. Bailey*, 15 Ill. 178; *Young v. Dowling*, 15 Ill. 481.

² *Baker v. Bradby*, 23 Ill. 632; *Gridley v. Philips*, 5 Kan. 349; *Peterman v. Watkins*, 19 Ga. 153. Or, in Georgia, the administrator *de bonis non* may be ordered by the same court granting the license to execute or complete the sale. *Ibid.* So likewise, in Kansas. *Gridley v. Philips*, *supra*.

³ *Gridley v. Philips*, 5 Kan. 349.

jurisdictional limits, the court can enforce the making of the deed.¹ But if he leaves the State, the proper course is to vacate his letters, appoint a successor, and by order in probate cause such successor to execute the proper conveyance to complete the sale. It is not within the jurisdiction of an ordinary chancery jurisdiction to decree a title. The sale must be perfected through the probate court.²

§ 434. Where the county court, in Virginia, was empowered by special act of Assembly to decree a sale of a decedent's lands by the administrator, and decreed accordingly, it was held that the deed should be by the administrator as such and not as a commissioner.³

§ 435. An administrator *pro tem.* can not execute a deed of conveyance of a decedent's lands without proper order and authority from the court specially allowing him so to do. Such deed is inadmissible in evidence and passes nothing.⁴

§ 436. In Mississippi, the ruling is, that an administrator *de bonis non* can not execute a deed of land sold by his predecessor.⁵

§ 437. A married woman who is a guardian can convey the estate of her ward by deed, under a judicial sale, without being joined by her husband in the deed.⁶ In Missouri, a sale and conveyance by one of two administrators, is good, the sale being otherwise regular.⁷ But the contrary doctrine prevails in California.⁸

II. TO WHOM TO BE MADE.

§ 438. Ordinarily the conveyance is to be made to the purchaser, if not desired by him to be made to some one else; but in judicial sales, as the whole matter remains under the control of the court until the delivery of the deed,⁹ and the purchaser,

¹ Gridley *v.* Philips, 5 Kan. 349.

² Ibid.; Baker *v.* Bradby, 23 Ill. 632.

³ Corbell *v.* Zeluff, 12 Gratt. 226.

⁴ Robinson *v.* Martel, 11 Texas, 149.

⁵ Davis *v.* Brandon, 1 How. (Miss.) 154.

⁶ Palmer *v.* Oakley, 2 Doug. (Mich.) 433.

⁷ Vallee *v.* Fleming, 19 Mo. 454, 464.

⁸ Gregory *v.* McPherson, 13 Cal. 562.

⁹ Blossom *v.* R. R. Co., 3 Wall. 207; Deaderick *v.* Watkins, 8 Humph. 520; Deaderick *v.* Smith, 6 Humph. 138; Requa *v.* Rea, 2 Paige, 339.

by his purchase, becomes a party to the proceedings, and is, therefore, in court,¹ the court has full power, at his request, to order the deed to be made to another person as grantee in his place, on full payment of the purchase money. A deed to such other person, made under such sale and substitution, if otherwise sufficient, will be valid,² “without prejudice, however, to any equities, rights, or liens, which may have become vested before such assignment of his bid,”³ and subject to all equities or liens which, in the meantime, may have vested as against the original purchaser.⁴

So, in a sale made by an administrator, under an order of court and license to sell real estate of a decedent, the deed may be made to the assignee of the purchaser and will be valid as against any objection on that account.⁵ Likewise in cases of judicial sales generally.⁶

§ 439. The purchaser at a judicial sale is not bound to accept a deed with conditions or reservations, not stated in the notice and decree, or not made known at the time of sale. Thus the purchaser of a lot of ground without any restrictions made known, takes it free of such easements as underground culverts, lying in the premises beneath the surface thereof and extending from an adjoining lot. The burden must be apparent, or known to the purchaser, else he will not be forced to complete his purchase, subject thereto.⁷

Neither is the purchaser bound to accept a deed for a doubtful title, or one made in defective proceedings.⁸

III. WHEN TO BE MADE.

§ 440. So soon as the sale is confirmed by the court and the purchaser has performed the requirements resting on him by the terms of sale as to the purchase money, he then becomes entitled to a deed. The sale, however, in some cases, as for instance sales in probate, is not yet completed until the deed

¹ *Blossom v. R. R. Co.*, 3 Wall. 196, 207.

² *Williams v. Harrington*, 11 Ired. 616; *Proctor v. Farnam*, 5 Paige, 614.

³ *Proctor v. Farnam*, 5 Paige, 614.

⁴ *Ibid.*

⁵ *Ewing v. Higby*, 7 Ohio, 178.

⁶ *Voorhees v. The Bank U. S.*, 10 Pet. 478, 479.

⁷ *Scott v. Beutel*, 23 Gratt. 1.

⁸ *Earle v. Turton*, 26 Md. 34.

be approved by the court.¹ If the sale be on a credit, then the right of the purchaser to a deed before full payment depends on circumstances and terms of sale.² If the order of sale is to remain in force only a limited time, then the deed must be executed and delivered within that time. Otherwise it will be void.³ But in Michigan there is a contrary ruling.⁴

In the case cited of *Macy v. Raymond*,⁵ the question as to when the sale is completed arose incidentally in regard to an administrator's sale. The statute of Massachusetts required the sale to be made within one year from the granting of the order of sale. The deed was delivered after the year had expired. The court held that the power to make it had expired; that the sale was not complete until the delivering of the deed, and that as it was not delivered within the year, the proceedings were

¹ *Leshey v. Gardner*, 3 Watts & Sergt. 314; *Morton v. Sloan*, 11 Humph. 278.

² *Barnes v. Morris*, 4 Ired. Eq. 22.

³ *Mason v. Ham*, 36 Maine, 573; *Macy v. Raymond*, 9 Pick. 287; *Wellman v. Lawrence*, 15 Mass. 326.

⁴ *Howard v. Moore*, 2 Mich. 226.

⁵ 9 Pick. 285. *Per Curiam*: A fatal objection to the maintenance of this action arises out of the delay in the sale. The license was to be in force one year. It was not questioned in the argument that if the land had not been put up at vendue within the year the deed would have been ineffectual; but it was said that, as in popular estimation the land was sold within the year, the delivery of the deed after the year expired was sufficient. We think this construction can not prevail. The object of the legislature was, that the sale should be concluded and the deed delivered within the year. Otherwise there might be a complete evasion of the statute and the estate be kept open for twenty years. No property passed until the deed was given, and until then, in a legal sense, there was no sale. And though the popular sense may be the true one where the act of the legislature does not relate to a technical subject, yet it being here the object to limit the time of sales and prevent estates from being kept open longer than is necessary, the legal sense seems to be the proper one to be adopted. It is said, however, that if the land is bid off within the year, but the deed is not given, a bill in equity will lie to enforce a specific performance of the contract, and so it would be absurd to give a different construction of the statute in a writ of entry. Our construction might be incorrect, if a bill in equity would lie after the expiration of the year. But a court of equity would not decree a useless act, a specific performance where the party could not perform. If the statute had said expressly that the deed should be given within the year, a decree of specific performance after the year would be nugatory; and so the case depends on the construction of the statute. Nor is there any need of allowing more than a year for the delivery of the deed. If the party who bids off the land demands his deed within the year and it is refused, he has his action at law for damages, and that is sufficient.

void, and that the grantee took nothing under the deed. The statute of Massachusetts has since been altered by the act of 1840 in respect to the time of completing the sale. But the principle in that case adjudged that the sale is only completed by delivery of the deed, is not affected thereby.

§ 441. If the clerk or master conducting the sale, convey, before payment of purchase money, yet the conveyance is not by reason thereof subject to collateral impeachment of the sale in an action of ejectment involving its validity. The objection must be made in equity by a direct proceeding, and equity will adjust the rights of both parties to the deed, which a court of law is incompetent to do. It will declare a lien for the unpaid part of the purchase money, and will adjust equities as to partial payments, if any.¹

IV. ITS RECITALS AND DESCRIPTIONS.

§ 442. Mere misrecitals in the deed as to the order of sale or previous proceedings will not invalidate the conveyance and title, if enough appears from the whole record, deed, and proceedings to clearly identify the real case and show the true facts and circumstances under which the deed is made.² Nor will the misnomer of an executor or executrix, who makes the sale, by describing him or her as administrator or administratrix.³ In Iowa, the term administrator is, by statute, made to mean as well executor as administrator.⁴

§ 443. The necessity of reciting the order or decree in the deed depends mainly on the statutes and local practice in the several States. In New York, Illinois, and others of the States, it is held essential to the validity of the deed.⁵ While in Georgia, Texas, and some others of the States, it is held sufficient if the order be referred to and identified.⁶ Doubtless, the safer course is to recite the order or decree in the deed at length and with accuracy. After confirmation it is held that prior defects

¹ Beard *v.* Hall, 63 N. C. 39.

² Thomas *v.* LeBaron, 8 Met. 355; Sheldon *v.* Wright, 5 N. Y. 497; Jones *v.* Taylor, 7 Texas, 240; Saltonstall *v.* Riley, 28 Ala. 164.

³ Cooper *v.* Robinson, 2 Cush. 184.

⁴ Revision of 1860, Sec. 2333. This section, however, does not seem to have been embodied in the code of 1873.

⁵ Atkins *v.* Kinnan, 20 Wend. 241; Doe *v.* Hileman, 2 Ill. 323.

⁶ Brown *v.* Redwyne, 16 Ga. 67.

as to description are remedied if there be an accurate description in the sale, order of confirmation, and the deed.¹

V. WHAT PASSES BY IT.

§ 444. However the proceedings and deed may be as to regularity and sufficiency in other respects, yet the deed can only pass the title to such property as is authorized to be sold by the decree.²

A sale of a tract of land generally, by the guardian of one only of two owners, on a decree made in proceedings in which no reference is made to the other owners or his rights, and to which proceedings he was not a party, carries to the purchaser only the title of such guardian's ward, and does not affect the interests of the other owners.³

§ 445. The deed, under a mortgage foreclosure and sale, carries the title and entire interest of both mortgagor and mortgagee.⁴ But not subsisting equities of those not made parties to the proceeding.⁵ It is a well established principle that in adversary proceedings, the deed under a judicial sale carries title only as against parties to the suit, and that "though a purchaser discovering a defective title at a proper time might be relieved from his purchase," yet he can not "be permitted, while holding on to his purchase, to insist upon having his title perfected by the application of the proceeds of the sale to the extinguishment of the claims of incumbrancers not parties to the suit."⁶ Such is the ruling and the language of the Maryland High Court of chancery in *Duval v. Speed*, 1 Md. Ch. Decis. 235.

§ 446. The widow's dower is not ordinarily affected by an administrator's or guardian's sale in probate, although it appear that the order was made on her application, and no express reservation of dower be made in the sale or deed.⁷ In Missouri, how-

¹ *Williams v. Harrington*, 11 Ired. 616.

² *Shriver v. Lynn*, 2 How. 43; *Neel v. Hughes*, 10 G. and J. 7; *Ryan v. Dox*, 25 Barb. 440.

³ *Bryan v. Manning*, 6 Jones Eq. (N. C.) 334.

⁴ *Carter v. Walker*, 2 Ohio St. 339.

⁵ *Haines v. Beach*, 3 Johns. Ch. 459.

⁶ *Kholer v. Kholer*, 2 Edw. Ch. 69; *Darvin v. Hatfield*, 4 Sandf. 468; *Carter v. Walker*, 2 Ohio St. 339.

⁷ *Jones v. Hollopeter*, 10 S. and R. 326; *Owens v. Slatter*, 26 Ala. 547. (But by a recent ruling of the United States Supreme Court it is held that consent

ever, under the code of 1825, it was otherwise.¹ But if she sell and convey with warranty, she will, by her deed, though made as administrator or as guardian, be "completely estopped" from claim of dower.²

§ 447. In New Hampshire, an administrator of an insolvent estate is invested by the statute with a special and limited estate in the realty. The right to the rents and profits, and to possession until administration be closed, or the land be sold by order of court. In *Bergin v. McFarland*,³ in that State, it is held that a deed of the administrator so imperfect in itself, or in the proceedings under which it is made, that it will be inoperative to carry the fee as against the heirs, will nevertheless protect the grantee as against the heirs during such time as the estate is not fully administered, for which time the administrator, if no deed were made, would be entitled to the possession, the rents, and the profits.

§ 448. In Pennsylvania, it is held that "nothing can be sold (on sales in partition) but the title, which is vested in the parties to the proceedings."⁴

§ 449. A mortgage made by a coparcener, pending proceedings for partition, is overreached by the proceedings in partition, which vest the entire estate in the purchaser at partition sale unincumbered by the mortgage.⁵

§ 450. Where by law, lands are to be valued before selling, in judicial or execution sales, the growing crops thereon situated do not pass to the purchaser by the sale and deed. The reason given is that the valuation is but of the lands, and that they must sell for a certain proportion of their value or not at all. Thus, in Ohio, where such is the law, requiring lands about to be sold on execution, or in proceedings in partition, it is settled that on a sale and deed in partition of lands in that State, having at the time of sale growing crops thereon, such crops do not pass to the purchaser.⁶

of the widow to a judicial sale of a ward's property, made in conformity to a proper decree, and the sale confirmed by the court, cuts off any right of dower or interest of such widow in the lands sold. *Knotts v. Stearns*, 1 Otto, 638.)

¹ *Mount v. Valle*, 19 Mo. 621.

² *McGee v. Mellon*, 23 Miss. 585.

³ 26 N. H. 533.

⁴ *Allen v. Gault*, 27 Penn. St. 473.

⁵ *Sears v. Hyer*, 1 Paige, 483.

⁶ *Houts v. Showalter*, 10 Ohio St. 124, 127; *Parker v. Storts*, 15 Ohio St. 351, 855; *Jones v. Thomas*, 8 Blackf. 428.

And so the emblements or growing crops of a tenant in possession of mortgaged premises under the mortgagor do not, upon general principles, pass to the purchasers at a judicial sale on foreclosure of the mortgage. "The annual crops are saved to the tenant under the common rule relating to emblements, because the termination of the lease is uncertain. The elder jurists find abundant reason for the doctrine in the protection the law owes to agriculture." Such is the rule in reference to a tenant under the mortgagor, *bona fide* such, irrespective of appraisement laws. The courts regard the growing crops as personality.¹ But although (as we have just seen) the emblements do not, as a general rule, pass to the purchaser at judicial (or execution) sale; and although the sale is not completed until the execution and delivery of the deed;² yet, the occupying tenant or debtor in possession can not prolong his occupancy or have the right to gather in the fruits of his labor by putting in a crop, or seeds, after the sale, at the biddings, and before confirmation and conveyance of the premises, unless the same be put in by consent of the purchaser. In *Parker v. Storts*, involving a judicial sale on mortgage foreclosure, the court say: "His own unauthorized acts after the sale can not be allowed to impair the rights of the purchaser, and must be done at his own peril." Such is the doctrine decided in the above case in Ohio, wherein the court say, in reference to past decisions in that State on the subject, that they are "wholly unaffected by the opinion" in this case delivered.³

§ 451. "An irregular or void judicial sale" say the United States Supreme Court, in *Brobst v. Brock*, "made at the instance of the mortgagee, passes to the purchaser all the rights the mortgagee, as such, had."

There being no service on the mortgagor in the case above cited, the judgment was held to be void as to him, and therefore it did not cut off his equity of redemption, nor did the sale. Had the judgment been authorized by service, and erroneously entered, yet it would have been valid until reversed or set aside, and a sale under it would have carried the full title of both mortgagor and mortgagee, except the equity of redemption of the

¹ *Casselly v. Rhodes*, 12 Ohio, 88, and cases there referred to.

² *Leshey v. Gardner*, 3 Watts. & Sergt. 314; *Erb v. Erb*, 9 Ibid. 147; *Parker v. Storts*, 15 Ohio St. 351.

³ 15 Ohio St. 351, 355.

mortgagor. But being made at the instance of the mortgagee, and purporting to be a sale of the lands and whole interest covered by his mortgage, the mortgagee is estopped to deny that all his rights passed by the sale; and the purchaser having paid the mortgage debt, is subrogated to the mortgagee's rights.¹

§ 452 In making title under an administrator's sale of lands by virtue of a decree in probate, the appointment or authority of the administrator to act as such must be shown. "The whole record, from and including the appointment of the administrator down to and including the sale of the real estate, is but one continuous record; and it must all be considered as before the court and the parties, upon application to sell and confirm the sale of the real estate."² And where the appointment of the administrator is a void act, so the sale of real estate that he may make is likewise void and of no effect. This, too, notwithstanding a decree authorizing the sale, and a subsequent order of confirmation thereof.³

§ 453. Under the statute in Missouri, providing that widows are endowable of the lands whereof their husbands *or any other person* is seized of an estate of inheritance to their husband's use at any time during marriage, it is held that a widow is entitled to dower in lands purchased and partly paid for by the husband by an executory contract, though not conveyed during his lifetime. That the vendor in such contract stands seized to the use of the purchaser to the extent of the payment, and subject to payment of the balance of the purchase money,⁴ and therefore when such an interest of a decedent in lands is sold in probate by the administrator for the payment of debts, the widow is entitled to maintain an action of dower against the purchaser under the administrator, for her share in all the remaining interest that is in excess of the unpaid portion of the purchase money on the original purchase of her husband.⁵ But whether in such cases the quantity set off as dower is to be adjusted to the value of one-third of the money paid, or whether she takes a third of the whole, subject to payment of one-third of the balance remain-

¹ Brobst *v.* Brock, 10 Wall. 519, 534; Gilbert *v.* Cooley, Walker Ch. 494; Jackson *v.* Bowen, 7 Cow. 13.

² Frederick *v.* Pacquette, 19 Wis. 541; Sitzman *v.* Pacquette, 13 Wis. 291.

³ Ibid.

⁴ Hart *v.* Logan, 49 Mo. 47.

⁵ Ibid.

ing unpaid at the husband's death, is not decided by the court in the case here cited.

§ 454. If no money be paid, however, upon such executory contract, and the purchaser be not under an absolute liability or contract to pay, then, although the contract may give him a valid privilege of doing so, yet, in such case, no dower will inure to the widow upon his death;¹ for, in the latter case, the purchaser is not vested with any inheritable interest in the land, and the vendor, as nothing is paid, is not seized of the estate or any interest therein to the vendee's use.

§ 455. In Kentucky, the ruling is that devisees in remainder of real estate are not cut off by proceedings and sale in a court of *general chancery jurisdiction* at the suit of the executor, to which they are not made parties; and that a *decretal sale* in such case does not bind them.²

¹ *Brant v. Robertson*, 16 Mo. 129. If, however, the interest of the husband under such executory and partially paid up contract (*supra*) be sold by him, or on process against him, during his lifetime, then no right of dower therein inures to the widow at his death, under the peculiar statutes of Missouri. *Worsham v. Callison*, 49 Mo. 206.

² *Feltman v. Butts*, 8 Bush, 115.

CHAPTER IX.

ESTOPPEL—WARRANTY—CAVEAT EMPTOR IN JUDICIAL SALES.

- I. ESTOPPEL.
- II. WARRANTY.
- III. CAVEAT EMPTOR.

I. ESTOPPEL.

§ 456. Sales, as well judicial and on execution as others, may be so made, or made under such circumstances as will prevent the owner of the property from questioning their validity, though the sales be in other respects defective, or even void. And thus the claimant is subjected to an estoppel. In such cases title is conferred on the purchaser by estoppel.

§ 457. If one so far countenance the sale of his own property as to stand by and see it sold by the sheriff, or other officer, as the property of, and on execution against another, without objecting to the sale, he will be estopped to deny the validity thereof¹ as against a *bona fide* purchaser.

§ 458. Estoppels not only bind "parties but privies in blood and estate."²

What estops the ancestor estops the heir, and that which estops the original party estops also those claiming under him, in whatever right they claim.

§ 459. In *Bush v. Cooper*,³ the United States Supreme Court use the following language in reference to estoppels which run with the land: "Estoppels which run with the land, and work thereon, are not mere conclusions; they pass estates and constitute titles; they are muniments of title, assuring it to the purchaser. Their operation is highly beneficial, tending to produce security of titles."

¹ Epley *v.* Witherow, 7 Watts. 163; Carr *v.* Wallace, 7 Ibid. 394; Reid *v.* Heasley, 2 B. Mon. 254; Straus *v.* Minzesheimer, 78 Ill. 492; Sale *v.* Crutchfield, 8 Bush, 636.

² Bush *v.* Cooper, 18 How. 85; Baxter *v.* Bradbury, 20 Maine, 260; Carver *v.* Jackson, 4 Pet. 85; Wark *v.* Willard, 13 N. H. 389; White *v.* Patten, 24 Pick. 324.

³ 18 How. 85.

This case was that of a mortgagor, with warranty implied in law, who bought in the premises afterwards on execution sale, based on a judgment lien which was older than the mortgage. The Supreme Court of Louisiana, as also that of the United States, held that he was estopped to set up his execution deed against the effect of his mortgage, and was estopped by his warranty, from "denying that he was seized of the particular estate at the time of making" the mortgage. In short, that a mortgagor, or grantor, can not buy in a superior title and enforce it against those claiming under his own deed of warranty.¹

The recital in a deed, or assertion of ownership, or other fact, upon the strength of which another is induced to commit his interest, or to buy, will estop the person making such recitals or assertions, from denying the truth thereof, or asserting a claim inconsistent therewith.

§ 460. If one entitled to dower in lands of a decedent sell them under proceedings in probate as administrator, and convey by deed of warranty, she is thereby estopped from afterwards claiming dower in the lands so sold and conveyed.² Otherwise, however, if she convey without warranty.³

§ 461. The obtaining of an injunction by a widow and heirs to prevent sales of a decedent's lands on judgments at law until the same can be sold by proceedings in probate, in course of administration, will estop them from objecting that they were not notified of such proceedings in probate afterwards prosecuted for the sale of such lands.⁴

§ 462. A husband and wife being seized of real estate as tenants of the entirety, the husband died leaving a will by which all his real estate was directed to be disposed of by sale, and the proceeds to be applied in a certain way, but not authorizing any one to make the sale. The lands were sold by order of the Orphans' Court, including that which had been held by the husband and wife as tenants of the entirety. The widow encouraged

¹ *Bush v. Cooper*, 18 How. 82, 85; *Van Rensselaer v. Kearney*, 11 How. 322; *Stewart v. Anderson*, 10 Ala. 504; *Dorsey v. Gassaway*, 2 Harr. & J. 411; *Gragg v. Brown*, 44 Maine, 157.

² *McGee v. Mellon*, 23 Miss. 585; *Maple v. Kussart*, 53 Penn. St. 348; *Stroble v. Smith*, 8 Watts, 208; *Heard v. Hall*, 16 Pick. 457.

³ *Sip v. Lawback*, 17 N. J. 442; *Owen v. Slatter*, 26 Ala. 547; *Wright v. Degroff*, 14 Mich. 164.

⁴ *Simmons' Estate*, 19 Penn. 439.

the purchaser to buy at such sale and herself received part of the purchase money. It was held that although the widow was invested with the ownership in fee as survivor of the husband, that nevertheless she was estopped from setting up title to the property, she having encouraged the purchaser to buy the same as belonging to the estate of the decedent.¹

§ 463. But an inexperienced woman having a fair and meritorious resulting trust of ownership in lands, and who, under adverse interested influences, buys in the same lands at a foreclosure sale made under a mortgage executed without authority by the trustee, and procured by the mortgagees with notice of the trust, is not estopped by so buying from asserting the true ownership as a defense against paying the purchase money, when such purchase has been made under mistaken necessity as a means of protecting her home and her rights. In such case, the conveyance under the purchase will be enforced in her favor, while payment of the purchase money will be released as to such purchaser.²

§ 464. In ejectment by the purchaser under a mortgage foreclosure, the mortgagor is estopped from denying his own title at the date of the mortgage, and is also estopped from setting up an outstanding title to the premises in a third person. He can not execute a deed of mortgage on property and then deny his right to that of which he thus assumed to be the owner.³

§ 465. A ward is not estopped by the deed of his guardian, though made with warranty. The warranty binds the guardian personally.⁴

¹ *Maple v. Kussart*, 53 Penn. St. 348. In this case the court say: "The proof is that she urged the purchasers to buy that the property might remain in the family, and it was at her request they bought. They paid the purchase money, \$6,410, and it was distributed to the widow and heirs." And that, "It is a maxim of common honesty, as well as of law, that a party can not have the price of land sold and the land itself." * * "If one receive the purchase money of land sold, he affirms the sale, and he can not claim against it whether it was void, or only voidable; *Adlum v. Yard*, 1 Rawle. 163; *Wilson v. Bigger*, 7 W. & S. 162; *Crowley v. McConkey*, 5 Barr. 168; *Stroble v. Smith*, 8 Watts, 280; *Smith v. Warden*, 7 Harris, 424." And the court also held, "That the fact that in sales of this kind, the maxim *caveat emptor* applies, does not avoid the estoppel."

² *Faris v. Dunn*, 7 Bush, 276.

³ *Redman v. Ballamy*, 4 Cal. 247; *Bush v. Marshall*, 6 How. 288; *Tartar v. Hall*, 3 Cal. 263.

⁴ *Young v. Lorain*, 11 Ill. 624.

§ 466. Nor is a purchaser of lands at a judicial sale made under a void decree estopped to deny the title of those as whose land it is sold.¹

§ 467. The receipt of a widow or by a ward, after such ward attains to his majority, of their portion of purchase money of lands sold by an administrator or guardian, under proceedings in probate, will estop them from disputing the validity of the sale, if received with full knowledge of their rights and of all the circumstances, and so likewise does the receipt of the proceeds of such sale invested in other property.²

§ 468. If a party request or direct the officer to sell lands as his, and, being present at the sale, do not dissent, he is regarded as assenting, and is estopped from denying the title of the purchaser.³

§ 469. In *Penn v. Heisey*⁴ the court say: "It is a principle that, though in general estoppels are odious, as preventing a party from stating the truth, yet they are favored when they promote equity. Comyn's Dig. Title Estoppel. The application of this principle does not depend, as we understand it, upon any supposed distinction between a void and a voidable sale. If the sale be one or the other, receiving the money or its proceeds in other valuable property, with a knowledge of the facts, touches the conscience of the party, and, therefore, establishes the right of the party claiming under the sale, in one case as well as in the other."

Thus, where minors' lands have been sold in partition, and, after attaining to their majority, they receive their respective portions of the money arising from the sale, with full knowledge of all the circumstances, they are estopped to deny the validity of such sale, even though the proceeding may otherwise have been invalid as for want of obtaining jurisdiction of the case properly by the court, and, therefore, of course, as against all mere irregularities of the sale.⁵

And on the question of knowledge of the facts, the presump-

¹ Price *v. Johnston*, 1 Ohio St. 390.

² Ellis *v. Diddy*, 1 Smith, (Ind.) 354; Stroble *v. Smith*, 8 Watts, 280; Bohart *v. Atkinson*, 14 Ohio, 228; Scott *v. Freeland*, 15 Miss. 409; Penn *v. Heisey*, 19 Ill. 295; Walker *v. Mulvean*, 76 Ill. 18.

³ Reid *v. Heasley*, 2 B. Mon. 254, 257.

⁴ 19 Ill. 295. See also Duff *v. Wynkoop*, 74 Penn. St. 300, 306.

⁵ Walker *v. Mulvean*, 76 Ill. 18; Davidson *v. Young*, 38 Ill. 145, 146.

tion in law is, that the party being of full age, acted with knowledge thereof.¹ So an order of sale of lands of the ancestor, made in a proceeding wherein the heir is a party, estops such heir from thereafter disputing the ancestor's right to the land.²

§ 470. A lessor of real estate is estopped to deny the tenancy and lease as against a purchaser under process and judgment based upon a mechanic's lien on the premises, where such lessor has recognized the existence of the tenancy and lease by advancing to the tenant funds to aid in making the erections on the premises for which the lien is asserted, and has himself purchased back the lease or term from the lessee after the erection of the work for which the lien attaches.³

§ 471. And the case is still stronger against the owner or owners if he or they, by act or word, openly encourage the purchaser in making the purchase. Thus where an executor sold lands of a decedent under the semblance of judicial authority, but which, in fact, conferred no power to sell, and the heirs in whom the title vested by law encouraged the sale and purchase, it was held that they were not only estopped to deny the right of the purchaser to the premises in question, but were decreed, upon bill filed in equity, to execute a sufficient conveyance to quiet title in the purchaser,⁴ inasmuch as the proof on which the estoppel rested was perishable and might not be available in the future, if the question of title should remain open as between the parties.⁵

§ 472. To work an estoppel of the owner of goods levied on and sold on execution for the debt of another, it is not sufficient always that such owner is *merely passive*, for although one may be so estopped by standing by when his property is thus sold, and silently acquiescing, it is upon the supposition that he has full knowledge thereof and is free to object, and that his conduct in that respect misleads or deceives others into bidding and the officer into selling in ignorance of such owner's right. So that here, in fact, is the turning point, that is, that to work an estoppel there must be some act or omission to act, calculated to deceive or mislead the purchaser. If merely passive, then the

¹ Corwin *v.* Shoup, 76 Ill. 246.

² Hardee *v.* Williams, 65 N. C. 56.

³ Allen *v.* Sales, 56 Mo. 28.

⁴ Favill *v.* Roberts, 50 N. Y. 222, and ante Secs. 451, 456.

⁵ Wood *v.* Seely, 32 N. Y. 105; Favill *v.* Roberts, *supra*.

circumstances must be such as acquiescence may be implied therefrom.¹

§ 473. *Estoppels in pais* operate only on existing rights, not upon rights subsequently acquired. Therefore, the advising of one to purchase lands at execution sale, and recommending the title, does not estop the person so advising, when acting in good faith, from asserting an adverse title to the property when acquired subsequently to the giving of such advice.² To allow it to act upon title subsequently acquired would be unjust to the person holding such title at the time of the sheriff's sale, as it would thereby lessen its marketable value by depriving the one person so advising at the sheriff's sale of the privilege of buying, and as a sequence thereto deprive the then innocent owner of the right of selling to the person so advising, and thereby diminish the prospect of purchasers.

§ 474. But if one fraudulently induce a levy to be made upon his own property as that of the execution debtor, and silently suffer the same to be removed by the officer, and thereby shield the property of the execution debtor from an intended levy thereon, and so enable the debtor to remove the same out of the jurisdiction and reach of the officer, the doctrine of estoppel will prevent the owner of the property thus levied upon from setting up a claim to the same.³

II. WARRANTY.

§ 475. It is a well settled principle that in judicial sales there is no warranty.⁴ This principle, as a general rule, holds good as to all those sales of property, real or personal, (they being in character judicial sales,) made in equitable proceedings under the direction and control of the courts, usually denominated mort-

¹ Straus *v.* Minzesheimer, 78 Ill. 492.

² Donaldson *v.* Hibner, 55 Mo. 493.

³ Colwell *v.* Brower, 75 Ill. 516.

⁴ The Monte Allegre, 9 Wheat. 616; United States *v.* Duncan, 4 McLean, 607; Owings *v.* Thompson, 4 Ill. 502; Lynch *v.* Baxter, 4 Texas, 431; Williams *v.* McDonald, 13 Texas, 322; Freeman *v.* Caldwell, 10 Watts, 9; King *v.* Gunnison, 4 Penn. St. 171; Fox *v.* Mensch, 3 Watts. & Sergt. 444; Jennings *v.* Jenkins, 9 Ala. 285; Rogers *v.* Horn, 6 Rich. L. 361; Brackenridge *v.* Dawson, 7 Ind. 383; Halleck *v.* Guy, 9 Cal. 181; Sumner *v.* Williams, 8 Mass. 162; Bingham *v.* Maxcy, 15 Ill. 295; Evans *v.* Dendy, 2 Spears, L. 8.

gage sales,¹ guardian's, executor's and administrator's sales,² sales for enforcement of vendors', and statutory liens,³ and sales in proceedings for partition.⁴ In short, in all sales made under supervision and control of the courts on decrees in equity or on decrees made in the exercise of equity powers,⁵ there is no warranty; the purchaser takes what he gets.⁶ The officer, trustee, or person executing the deed, is the mere "agent or instrument" of the court,⁷ is not liable for defect of title or insufficiency of the proceedings,⁸ nor at all, except for fraud,⁹ unless he conveys with warranty, and then the covenant of warranty binds him personally, and him only.¹⁰ In *The Monte Allegre*, more particularly referred to under the next head, this rule is plainly asserted by the Supreme Court of the United States, and it is the general doctrine in most, if not all, of the States, and of the common law.¹¹

III. CAVEAT EMPTOR.

§ 476. The rule of *caveat emptor* applies in all its rigor to judicial sales.¹²

¹ Ante, Sec. 209 et seq.

² Mockbee *v.* Gardner, 2 Har. & G. 176; Vandever *v.* Baker, 13 Penn. St. 126; Lynch *v.* Baxter, 4 Texas, 431.

³ Ohio Life & Trust Co *v.* Goodin, 10 Ohio St. 557.

⁴ Rogers *v.* Horn, 6 Rich. L. 361; Young *v.* Lorain, 11 Ill. 624.

⁵ United States *v.* Duncan, 4 McLean, 607.

⁶ The Monte Allegre, 9 Wheat. 616.

⁷ Mullikin *v.* Mullikin, 1 Bland, 538, 541; Harrison *v.* Harrison, 1 Md. Ch Decs. 331; Vandever *v.* Baker, 13 Penn. St. 121, 126.

⁸ Mockbee *v.* Gardner, 2 Har. & G. 176.

⁹ Ibid.

¹⁰ Young *v.* Lorain, 11 Ill. 624; Brackenridge *v.* Dawson, 7 Ind. 383; Sumner *v.* Williams, 8 Mass. 162; Mellen *v.* Boarman, 13 S. & M. 100; Mockbee *v.* Gardner, 2 Har. & G. 176.

¹¹ The Monte Allegre, 9 Wheat. 616.

¹² Ibid.; Mason *v.* Wait, 5 Ill. 127; Worthington *v.* McRoberts, 9 Ala. 297; Fox *v.* Mensch, 3 Watts. & Sergt. 444; Mellen *v.* Boarman, 13 S. & M. 100; Lynch *v.* Baxter, 4 Texas, 431; Bingham *v.* Maxcy, 15 Ill. 295; Vandever *v.* Baker, 13 Penn. St. 124, 126; Anderson *v.* Foulke, 2 Har. & G. 346; Thompson *v.* Munger, 15 Texas, 523; Bickley *v.* Biddle, 33 Penn. St. 276; Strouse *v.* Drennan, 41 Mo. 289; Walden *v.* Gridley, 36 Ill. 523. The doctrine is stated in Illinois in the following terms: "Appellant, when he purchased at the administrator's sale, acquired such title only as was then vested in the heirs of Strain. If it was then subject to the lien of Walker's judgment, he acquired it with that impurity, and to preserve his title he must clear it from

The Supreme Court of the United States hold that, "generally in all judicial sales the rule *caveat emptor* must necessarily apply from the nature of the transaction, there being no one to whom recourse can be had for indemnity against any loss which may be sustained. Is there then (they ask) anything peculiar in the powers of a court of admiralty that will authorize its interposition, or justify granting relief to which a party is not entitled by the settled rules of the common law?" They say, "we know of no such principles."¹

Though the case in which this doctrine is thus broadly asserted was a case in admiralty, it will be seen that the decision was avowedly put upon the principles of the common law. The same case is expressly referred to and the same principle reasserted by the United States Court of Claims in the case of *Puckett v. The United States*.²

§ 477. In the absence of misconception and of fraud the buyer must look out for himself. He buys at his own risk, both as to title and as to quality. The rule does not apply, however, in case there be fraud.³ And it has been held, in Pennsylvania, that the rule applies only to open defects; that, as against secret defects in a title, a purchaser will be protected.⁴

the incumbrance." Ibid. p. 532. *Creps v. Baird*, 3 Ohio St. 277; *Corwin v. Benham*, 2 Ohio St. 36; *Miller v. Finn*, 1 Neb. 254; *Hamblin v. Pleasants*, 31 Texas, 638; *Aven v. Beckom*, 11 Geo. 1; *Ramsey v. Blalock*, 32 Geo. 376; *Worthy v. Johnson*, 8 Geo. 236; *Glenn v. Clapp*, 11 Gill. & J. 1; *Bassett v. Lockard*, 60 Ill. 164.

¹ *The Monte Allegre*, 9 Wheat. 616.

² 4 Am. L. Reg. O. S. 459, 460.

³ *Bingham v. Maxcy*, 15 Ill. 295.

⁴ *Banks v. Ammon*, 27 Penn. St. 172.

CHAPTER X.

COLLATERAL IMPEACHMENT OF JUDICIAL SALES—VOID JUDICIAL SALES—RETURN OF PURCHASE MONEY.

- I. WHEN IMPEACHABLE COLLATERALLY.
- II. WHEN NOT IMPEACHABLE COLLATERALLY.
- III. VOID JUDICIAL SALES.
- IV. RETURN OF PURCHASE MONEY.

I. WHEN IMPEACHABLE COLLATERALLY.

§ 478. The principle is well settled, not only in the Supreme Court of the United States, but in the State courts generally, that if there is no jurisdiction the proceedings are void; they are a nullity, and confer no right; are no justification, and will be rejected when collaterally drawn in question.¹ If a court acts without authority, its judgments and orders are nullities, and are not voidable only, but are absolutely of no effect, and can not bar a recovery or defense asserted in opposition to them, even prior to their reversal.² And though the court has jurisdiction, if from any cause the sale or deed be really void, then the objection is good when made in a collateral proceeding.³

II. WHEN NOT IMPEACHABLE COLLATERALLY.

§ 479. It is equally well settled in the Supreme Court of the United States that if the subject matter be within the jurisdiction of the court, and is brought before them by proper petition, the validity of the proceedings being brought in question collaterally can not be void, but merely voidable. Errors and irregularities, and all other deficiencies, if any there be, must be reached and corrected by some direct proceeding, either before

¹ Thompson *v.* Tolmie, 2 Pet. 157; Shriver *v.* Lynn, 2 How. 43; Wilkinson *v.* Leland, 2 Pet. 627; Clark *v.* Thompson, 47 Ill. 27; Morris *v.* Hogle, 37 Ill. 150; Swiggart, *v.* Harber, 5 Ill. 364, 366; Miller *v.* Handy, 40 Ill. 448; Osgood *v.* Blackmore, 59 Ill. 261; Haywood *v.* Collins, 60 Ill. 328.

² Thompson *v.* Tolmie, 2 Pet. 157; Shriver *v.* Lynn, 2 How. 43; Elliott *v.* Piersol, 1 Pet. 328; Morris *v.* Hogle, 37 Ill. 150.

³ Cooper *v.* Sunderland, 3 Iowa, 114; Frazier *v.* Steenrod 7 Iowa, 339.

the same court, or in an appellate one, and such, too, is the general doctrine.¹

When a court has obtained jurisdiction it is competent to decide every question arising in a cause, and whether decided correctly or incorrectly, the decision, until reversed, is binding not only in the same, but in every other court.²

§ 480. If the jurisdiction over the subject matter appears on the face of the proceedings in which a sale is made, the errors or mistakes, if any there be, can not be examined when brought up collaterally.³

§ 481. Where debts have been regularly proven and allowed against the estate of a decedent, and lands sold on proper application of the administrator to pay the same, as appears by the record, then parol evidence can not be received in a collateral proceeding to show that no debts ever existed against the estate. If the allowance of the debts and the sale were brought about by fraud, then the remedy is in a direct proceeding in a court of

¹ Thompson *v.* Tolmie, 2 Pet. 157; Parker *v.* Kane, 22 How. 1, 14; Alexander *v.* Nelson, 42 Ala. 462; Dequindre *v.* Williams, 31 Ind. 444; Southern Bank of St. Louis *v.* Humphreys, 47 Ill. 227; Woods *v.* Lee, 21 La. Ann. 505; Covington *v.* Ingram, 64 N. C. 123; Iverson *v.* Loberg, 26 Ill. 179. In the case last cited, the Supreme Court, Justice CATON, say: "We are obliged to affirm this judgment, much against our inclination. The sale was no doubt a great outrage, and we should, as at present advised, not hesitate to reverse the proceeding, were it directly before us. But here it comes up collaterally, and we can not disregard that proceeding, unless it was void for want of jurisdiction. We can not hold that such was the case. The petition stated enough to require the court to act in the premises — to set it in motion, and that was sufficient to give the court jurisdiction, and whatever was done under it was not in the exercise of an usurped power, but of one conferred by law; and although the court may have exercised that power erroneously, its orders and decisions are binding until reversed. If we are to look into any errors in that proceeding, it must be brought before us by writ of error."—P. 182.

² Elliott *v.* Piersol, 1 Pet. 328; Parker *v.* Kane, 22 How. 14; Grignon's Lessee *v.* Astor, 2 How. 319; Davis *v.* Helbig, 27 Md. 452; Wight *v.* Wallbaum, 39 Ill. 554; Iverson *v.* Loberg, 26 Ill. 179; Fithian *v.* Monks, 43 Mo. 502; Florentine *v.* Barton, 2 Wall. 210, 216.

³ Thompson *v.* Tolmie, 2 Pet. 157; Pursley *v.* Hays, 22 Iowa, 11; United States *v.* Ariéondo, 6 Pet. 709; Grignon's Lessee *v.* Astor, 2 How. 319; *Ex parte* Watkins, 3 Pet. 205; Rhode Island *v.* Massachusetts, 12 Pet. 657, 718; Phil. & Trenton R. R. Co. *v.* Stimpson, 14 Pet. 448; Thomas *v.* Le Baron, 8 Met. 355; Iverson *v.* Loberg, 26 Ill. 179; Weiner *v.* Heintz, 17 Ill. 257; Florentine *v.* Barton, 2 Wall. 210, 216; Downin *v.* Sprecher, 35 Md. 474; Dorsey *v.* Garey, 30 Md. 490; Cockey *v.* Cole, 28 Md. 276; Schley *v.* The Mayor and C. of Baltimore, 29 Md. 34.

general equity jurisdiction; but the jurisdiction and record of the probate court can not be collaterally impeached.¹

§ 482. In an action of ejectment involving the effect of an administrator's deed of lands sold for payment of debts in probate, the regularity or legality of the administrator's appointment, when the court had jurisdiction, can not be inquired into. Whether the appointment be regular or irregular, the person appointed becomes, at least, the administrator *de facto*, and, being such, the matter can not be questioned in a collateral proceeding.²

§ 483. In the case above cited the case of *Cutts v. Haskins*, 9 Mass., is referred to, and regarded as unsatisfactory; but it is not precisely in point with the question which was raised in Illinois. The Massachusetts case rested on an appointment by the probate court of a different county than the one in which the decedent died, an act absolutely prohibited by the Massachusetts statute. Hence the Massachusetts court treated the appointment as simply void, as an act in violation of law, and not as irregularity or mere error.³

§ 484. It follows, therefore, that if the court in probate have jurisdiction properly of the subject matter of the application, by petition properly presented, and of the persons of the parties in interest, if the statute so requires them, the sale, when made and confirmed, may not be impeached in a collateral proceeding, although it may have been made to pay not only a larger amount than was necessary, but also for the payment of claims, some of which were fraudulent in point of fact, and if the purchaser himself be not a party to the fraud; for after conveyance and confirmation, the sale can only be assailed by a direct proceeding in

¹ *Lamothe v. Lippott*, 40 Mo. 142. In this case the court say: "The record shows that the probate court had full jurisdiction, and the presumption is in favor of its proceedings, and it is not competent to attack the record by parol in this collateral manner. If the allowances were procured by fraudulent and false means and pretenses, unjustly and to the injury of the estate and the parties interested, a court of equity, on a proper showing of the facts, might afford a remedy; but in a proceeding wholly collateral, a party can not be permitted to introduce oral testimony to falsify the record, when it plainly appears that the court whose record is thus sought to be impeached had jurisdiction."

² *Wight v. Wallbaum*, 39 Ill. 554; *Riley v. McCord*, 24 Mo. 265.

³ *Cutts v. Haskins*, 9 Mass. 543.

chancery by original bill, when complete jurisdiction is obtained by the court making the sale.¹

§ 485. We do not conceive, however, that these principles, though well settled, can override positive statutory requirements as to things made necessary, or as a pre-requisite, to the validity of judicial sales, by the legislation of the several States, but take it to be a general rule that where jurisdiction of the case never actually attached, as for want of notice or other cause, and whereby statute sales are declared void, or may not be made unless certain things appear to have been done, then a deficiency in respect thereto can not be supplied by intendment or presumptions of law, nor upon the principles of *res judicata*. Yet, when such statutes are merely directory in defining the course to be pursued, then if the court had by law jurisdiction of the subject matter and jurisdiction of the case actually attached by filing a petition, or petition and notice, if notice was required, and such was exercised by the court by adjudication and order or decree, then by intendment of law all questions in regard to such statutory requirements, and as to questions necessary to be adjudicated in arriving at the conclusion attained, are put at rest by the decision and are binding as *res judicata* until reversed for error, or set aside by a direct proceeding; and that in the former class of cases sales are void and will be so treated when collaterally drawn in question;² and that in the latter class they are only voidable, and the means by which to avoid them is by an appeal or else by a direct proceeding to set them aside.³

¹ Myer *v.* McDougal, 47 Ill. 278; Moore *v.* Neil, 39 Ill. 256. In this case the court hold that it is not required to make valid an administrator's sale in probate that he should report the same to the court; but such is not the current of authorities.

² Cooper *v.* Sunderland, 3 Iowa, 114; Thornton *v.* Mulquinne, 12 Iowa, 549; Townsend *v.* Tallant, 33 Cal. 45.

³ Morrow *v.* Weed, 4 Iowa, 77; Little *v.* Sinnott, 7 Iowa, 324; Long *v.* Burnett, 13 Iowa, 28; Parker *v.* Kane, 22 How. 1, 14; Voorhees *v.* Bank of U. S., 10 Pet. 449; Griffith *v.* Bogert, 18 How. 158; Draper *v.* Bryson, 17 Mo. 71; Grignon's Lessee *v.* Astor, 2 How. 342; Miller *v.* Sherry, 2 Wall. 237; Doe *v.* Harvey, 3 Ind. 104; Bennett *v.* Owens, 13 Ark. 177; Saltonstall *v.* Riley, 28 Ala. 164; Benningfield *v.* Reed, 8 B. Mon. 102; Field *v.* Goldsby, 28 Ala. 218; Tomlinson *v.* McKaig, 5 Gill, 256; Boswell *v.* Sharp, 15 Ohio, 447; Merrill *v.* Harris, 6 N. H. 142; Jackson *v.* Robinson, 4 Wend. 436, 440; Cockey *v.* Cole, 28 Md. 276.

§ 486. It is the policy of the law to sustain judicial sales.¹ And in the case here cited, although no actual approval of the administrator's deed, or confirmation, appeared in the record, yet where it appeared that the court itself received and certified the acknowledgment of the deed, and afterward at the suggestion at the same term of an error in the description of a part of the land, corrected the same, then circumstances were held to relieve the case from the want of express evidence of approval; and it was moreover held that if it were apparent that the approval in such case was actually omitted, it would merely amount to an irregularity which would not *void* the deed in a collateral proceeding.²

§ 487. And so, upon the same principle, if a sale be made by a court of general chancery jurisdiction, of an infant's property, in a proceeding in which no one is appointed to defend for the infant, the court having *obtained jurisdiction*, the sale, though made in an erroneous manner, is *not void*. Nor is it *void*, for the reason that the court does not follow the requirements of the statute as to the disposition made of the proceeds of sale. The statutory requirements, in respect to both the appointment of the guardian *ad litem*, and the disposition to be made of the minor's money, being but *directory*, the sale will not be *void*.³

III. VOID JUDICIAL SALES.

§ 488. Jurisdiction, as we have seen, being indispensable to the validity of judicial proceedings, it follows that the first great essential to the validity of judicial sales is jurisdiction in the court making the sale. Without this the sale is *void*.⁴

§ 489. If the court making the order of sale be abolished by law before the final consummation of the sale, then the proceedings end with the court, and a conveyance resting on such previous circumstances is *void*.⁵ So if the law under which the

¹ Jones *v.* Manly, 58 Mo. 559, 565; Pattee *v.* Thomas, 58 Mo. 163, 175; Castleman *v.* Relfe, 50 Mo. 583.

² Jones *v.* Manly, *supra*; Pattee *v.* Thomas, *supra*.

³ Robinson *v.* Redman, 2 Duvall, 82; Calkins *v.* Johnson, 20 Ohio St. 539.

⁴ Shriver's Lessee *v.* Lynn, 2 How. 43; Morris *v.* Hogle, 37 Ill. 150; Dorsey *v.* Kendall 8 Bush, 294.

⁵ McLaughlin *v.* Janney, 6 Gratt. 608, 609.

proceedings are being had is repealed before the order or decree is executed, a sale made afterwards is void.¹

Likewise sales made at a great and unreasonable length of time after making the order or decree, and sales made after the lapse of such time as is by statute allowed for the order to remain in force, are void.² So a sale of lands not included in the decree is as to such lands void.³

And an administrator's sale of lands to raise funds merely to pay costs and expenses is void, though by order of court.⁴ Likewise a sale is void if made on different notice than that ordered in the decree.⁵

§ 490. In Iowa, it is provided by statute that a guardian's sale of a ward's lands under order or decree of court shall "not be avoided on account of any irregularity in the proceedings, provided it shall appear: *First*—That the guardian was licensed to make the sale by a court of competent jurisdiction. *Second*—That he gave bond (approved) in case one was required by the court granting the license. *Third*—That he took the oath prescribed by the statute. *Fourth*—That he gave notice of the time and place of sale, etc. *Fifth*—That the premises were sold accordingly at public auction, and are held by one who purchased them in good faith." The Supreme Court of that State construe these provisions to mean that "the sale shall not be avoided for any irregularities, except" in the foregoing particulars, and therefore that it "may be avoided on account of irregularities" in said particulars; that is, if it does not appear that said requirements were complied with.⁶ And where it did not appear from the record that the administrator making the sale took the oath so required, the sale was held to be absolutely void.⁷

¹ *Ludlow v. Wade*, 5 Ohio, 494; *Campau v. Gillett*, 1 Mann. (Mich.) 416; *Perry v. Clarkson*, 16 Ohio, 571; *Bank of Hamilton v. Dudley*, 2 Pet. 492, 493.

² *Marr v. Boothby*, 19 Maine, 150; *Welman v. Lawrence*, 15 Mass. 326; *Mason v. Ham*, 36 Maine, 573.

³ *Shriver's Lessee v. Lynn*, 2 How. 43; *Ryan v. Dox*, 25 Barb. 440.

⁴ *Dubois v. McLean*, 4 McLean, 486; *Summer v. Williams*, 8 Mass. 162, 200; *Sanford v. Granger*, 12 Barb. 392; *Bishop v. Hampton*, 15 Ala. 761; *Farrar v. Dean*, 24 Mo. 16.

⁵ *Glenn v. Wootten*, 3 Md. Ch. Decs. 514; *Reynolds v. Wilson*, 15 Ill. 394.

⁶ *Cooper v. Sunderland*, 3 Iowa, 114, 137, 138; *Thornton v. Mulquinne*, 12 Iowa, 549, 554.

⁷ *Ibid.* See also the same ruling under a similar statute, *Stewart v. Bailey*, 28 Mich. 251.

§ 491. In the same State, where the notice of application for order of sale was for one tract of land, and the license to sell, notice of sale, and deed, were of another and different tract, the court held the sale void for want of jurisdiction to grant the license to sell.¹

§ 492. A sale made in probate without petition or notice, or other means of conferring jurisdiction, though a decree be made on the report of the administrator, is void, and parol evidence may not supply the defect if contradictory to the record.²

§ 493. But, although the funds arising from the sale are required to be applied in a particular manner, yet it is not incumbent on a *bona fide* purchaser, unless required of him by the statute to see them so applied.³

§ 494. A sale made on a void decree in proceedings of foreclosure of a mortgage is absolutely void. In *Harshey v. Blackmarr*,⁴ where there was neither actual nor constructive service of the original process, nor voluntary appearance by defendant, but an unauthorized attorney appeared and answered for the defendant, the court, on application to vacate or relieve from a sale in such proceeding, held that the decree of foreclosure was a nullity, and that the sale thereon was void.

The sale in this case was made on a species of special execution under the statute, but the principle is equally applicable if the sale were on the decree itself. The statutory execution is but a substitute for the decree in the hands of the officer, and describes the property to be sold. In Mississippi it is held that there must be notice of application to all the heirs in an administrator's order of sale, or else the order and sale are void.⁵ And so, too, the sale is void if made without the necessary bond.

Such, also, is the ruling in Indiana. In *Hawkins v. Hawkins*,⁶ the doctrine is fully declared that a sale of real estate by an administrator on an order obtained without notice to the heirs is void, although confirmed by the court. In this case the court

¹ *Frazier v. Steenrod*, 7 Iowa, 339.

² *Bishop v. Hampton*, 15 Ala. 761; *Thornton v. Mulquinne*, 12 Iowa, 549.

³ *Cochran v. Van Surlary*, 20 Wend. 365.

⁴ 20 Iowa, 161; and see *Shelton v. Tiffin*, 6 How. 163. In the latter case the U. S. Supreme Court say, the judgment must be "considered a nullity," and "did not authorize the seizure and sale" of the property.

⁵ *Hamilton v. Lockhart*, 41 Miss. 460.

⁶ 28 Ind. 66.

say: "It is settled in this State that a sale of real estate by an administrator, without notice to the heirs, though it be ordered and confirmed by the court, is void. *Babbitt v. Doe*, 4 Ind. 355; *Doe v. Anderson*, 5 id. 33; *Doe v. Bowen*, 8 id. 197; *Gerrard v. Johnson*, 12 id. 636; *Wort v. Finly*, 8 Blackf. 335; *Bliss v. Wilson*, 4 id. 169."

The case cited from 6th How. *Shelton v. Tiffin*, in which a judicial sale was declared void, was in reference to a sale made in an adversary proceeding without notice, when on general principles notice was required. It is parallel, however, with the Indiana cases, cited above, in this, that by statute in Indiana actual notice is required in probate proceedings to sell lands. Such, too, is the ruling in Mississippi; and in proceedings there in probate to sell lands, want of notice avoids the sale.¹

A sale of real estate situated in Rhode Island, by an executrix, under a license granted by the probate court of New Hampshire, is void, and the deed is inoperative; but confirmation by act of the Rhode Island Legislature renders it valid.²

§ 495. An administrator's sale in probate of a homestead to pay debts, will be *void* in law if it be not made to appear by the record that the debts were contracted before the homestead rights attached to the property, or else some other fact or circumstance be shown thereby, which rendered the property liable to such sale.³

§ 496. A decree of a so-called confederate court, confiscating and causing to be sold capital stock of a railroad corporation, is void, and so is a sale thereon; and the purchaser at such sale takes no title.

The so-called confederate court being without authority to act as a judicial tribunal, it being the creature of an organization gotten up to resist and overturn the supreme power of the United States in certain States thereof, in violation of the supreme law of the land. It results therefrom that its acts were illegal and void, and the ownership of the stock was not changed by the sale.⁴

§ 497. And so sales made by a commissioner, under a decree

¹ *Gwin v. McCarroll*, 1 S. & M. 351; *Campbell v. Brown*, 6 How. (Miss.) 230.

² *Wilkinson v. Leland*, 2 Pet. 627, 655.

³ *Howe v. McGivern*, 25 Wis. 525.

⁴ *Central R. R. and Banking Co. v. Ward*, 1 Withrow's Corp. Cases, 209.

wherein the deed is not made until after the death of the purchaser, and is then made without any order of court to make the same, are in Kentucky void under the statute;¹ nor will the original order confirming the sale, made during the lifetime of the purchaser, dispense with the subsequent action required of the court, to authorize the making of the deed after the death of the purchaser.²

§ 498. The sale is under the supervision of the court, and a court of equity making the sale may allow the substitution of one person for another as purchaser, where it will work no injury.³ But the officer conducting the sale or making the deed can not so substitute one person for another as purchaser. It would void the deed.⁴

§ 499. And where by law, before an infant's lands may be sold in chancery a report of commissioners is required, stating the net value of the infant's real and personal estate, and the annual profits thereof, and whether the interest of the infant requires the sale to be made, and instead of such report the commissioners reported that they *had no hesitancy in saying it would be greatly to the interests of the infant to decree a sale of the land*, it was held, that such report was not sufficient to confer jurisdiction on the court to order a sale. That the requirement was a jurisdictional one, and without it no valid order of sale could be made, and that the sale was therefore void.⁵

§ 500. And so a judicial sale and deed thereon are void if the description of the lands intended to be sold and conveyed, be so uncertain as to be incapable of identity; as for instance where the land is described merely as a certain number of acres in a tract owned by a designated person, or granted to a certain person.⁶ And being so void, equity will not amend it, as equity does not ordinarily aid judicial sales.⁷

¹ Gill *v.* Hewett, 7 Bush, 10.

² Ibid.

³ Farmer's Bk. *v.* Clarke, 28 Md. 145; Davis *v.* Helbig, 27 Md. 452; Den *v.* Lambert, 13 N. J. (1 Green,) 182, 186.

⁴ Ibid.

⁵ Campbell *v.* Clay, 6 Bush, 498.

⁶ Jones *v.* Carter, 56 Mo. 403.

⁷ Young *v.* Dowling, 15 Ill. 481; Allen *v.* Moss, 27 Mo. 354, 364; Wannall *v.* Kem, 51 Mo. 150.

§ 501. Judicial sales, made under decrees, for sale of property, where the owner has not had a day in court, are void for want of jurisdiction, if the proceeding in which the decree is made be an adversary one, so as to entitle the party in interest to notice.¹ In the case of *Sexton v. Crockett*, cited in the note, the decree was against parties, one of whom died before the decree was executed by sale, and revivor of record was taken and the land sold, without making the heirs of the deceased defendant parties to the suit, or giving them a day in court, and the sale was set aside.

IV. RETURN OF THE PURCHASE MONEY.

§ 502. The better authority seems to be, that one buying at judicial sale, where the principle of *caveat emptor* prevails, is not entitled to relief, (except as for mistake or fraud,) on failure of title to the property purchased, after completion of sale and payment of the purchase money.²

§ 503. In Ohio it is held that the purchase money paid upon a void sale of a decedent's lands, constitutes no charge upon the land in the hands of the heirs, nor can it be recovered of the heirs.³

§ 504. In Virginia the contrary has been held as to the charge against the land. In *Hudgin v. Hudgin*,⁴ it was held that on failure of title the purchaser should be subrogated to the rights of the creditor, and that the purchase money paid by the purchaser became a lien on the land as it was originally a charge thereon. And so in Mississippi.⁵

But, in a late case in Virginia, where one purchased land at judicial sale, with knowledge of facts which render the sale inoperative, and whose purchase was confirmed without objection on his part, it was held that he would not be relieved on the mere ground of failure of title.⁶ Yet, *quære?* If the purchase money is still in the hands of the administrator, and the purchaser has

¹ *Underwood v. McVeigh*, 23 Gratt. 409; *Sexton v. Crockett*, 23 Ibid. 857.

² *The Monte Allegre*, 9 Wheat. 616; *Bingham v. Maxcy*, 15 Ill. 295; and see, *Ante Title "Caveat Emptor,"* where the authorities are referred to more numerously.

³ *Nowler v. Coit*, 1 Ohio, 519.

⁴ 6 Gratt. 320.

⁵ *Grant v. Lloyd*, 12 S. & M. 191.

⁶ *Young v. Bowyer*, 9 Gratt. 336.

bought without knowledge of the defects, if equity, on failure of title, will not cause the money to be refunded?¹

§ 505. In Tennessee it is held that the money may be recovered back before conveyance is made, on discovery of a defect in the title.² And in Mississippi, where the sale proved to be void for want of authority in the administrator to make it, the court allowed that fact in evidence for defendant in an action against him for the purchase money to show failure of consideration.³ And so in the same State, where an executor's sale was set aside for fraud after payment by the purchaser, the court allowed him a lien for the money on the premises.⁴

§ 506. And so in Maine, in the case of a void judicial sale, it was held that the purchaser had his action against the guardian for recovery of his money back, the invalidity of the sale being caused by the omission of the guardian to give the bond which was required by the statute before selling.⁵ But in the case cited from Maine, it seems that the deed contained covenants of warranty. The language of the court is, that "it can be recovered back of the guardian upon his covenants in the deed, or in an action for money had and received by him for their benefit."

§ 507. The rule in Iowa is, that the party contesting the sale is not bound to offer back the purchase money, where, in his pleadings, he avers or shows it never came to his hands; as, for instance, where a sale of a minor's lands is made by the guardian, although payment to the guardian may have been made; yet if it appear that the money has not come to the hands of the ward, he shall not be held to pay it back on setting aside the sale, but may leave the purchaser to look to the guardian for the same.⁶

§ 508. In a case of judicial sale in Illinois on account of alleged municipal improvements, it is held that the making of the deed to the purchaser, having been permanently enjoined,

¹ *Mockbee v. Gardner*, 2 Harr. & G. 176, 177. Such is the intimation of ARCHER, Justice, in the case just cited; but, inasmuch as it was not made to appear whether the purchase money was still in the administrator's hands or not, the court made no absolute ruling on that point.

² Read *v. Fite*, 8 Humph. 328.

³ *Campbell v. Brown*, 6 How. (Miss.) 230; *Laughman v. Thompson*, 6 S. & M 259.

⁴ *Grant v. Lloyd*, 12 S. & M. 191.

⁵ *Williams v. Morton*, 38 Maine, 47, 51.

⁶ *Lyon v. Vanatta*, 35 Iowa, 521.

and the sale set aside and declared void by a decree of the court, after payment of the purchase money by the purchaser, that the purchaser had a just claim for repayment of the purchase money as against the city.¹ But this claim is distinguishable from those preceding in this: that the purchaser in the latter was not allowed to complete his purchase by the reception of the deed of conveyance, but the sale was set aside in chancery, on application of the property owner, and the making of the deed permanently enjoined. There was, in the latter case, no partial enjoyment of the purchase, nor a semblance of consideration to the buyer for the money paid by him. The doctrine of *caveat emptor* could in no sense apply, for the sale was never completed. The bidder could not *beware* of receiving that which he was never permitted to get. Justice also required a return of the money by the city, since it had received the benefit of the work.²

¹ *Wells v. City of Chicago*, 66 Ill. 280.

² *Moses v. Macferlan*, 2 Burr. 1005.

CHAPTER XI.

JUDICIAL SALES OF PERSONAL PROPERTY.

- I. IN ADMIRALTY.
- II. IN ORDINARY COURTS OF LAW AND EQUITY.
- III. THERE IS NO WARRANTY.

I. IN ADMIRALTY.

§ 509. Judicial sales of personal property occur whenever and in whatever court such property is seized or laid hold of by judicial process and decree *in rem*, and is sold on such decree, without regard to personal judgment against the owner. Sales in admiralty in proceedings *in rem* are strictly such. In the language of the learned Justice REDFIELD, they "are strictly judicial,¹ and are merely carrying into specific execution a decree of the court *in rem*, which, by universal consent, binds the whole world."² If jurisdiction has attached, then by such sale the property passes to the purchaser by operation of law; "all the world are parties," and are bound thereby.³

§ 510. In admiralty cases purely *in rem* the jurisdiction is exclusively in the courts of the United States.⁴ If the property be within the territorial jurisdiction of the court, and there be the proper libel, information or plaint to confer jurisdiction of the particular case, and it be actually seized upon the process of the court, then whatever action, decision, or sale is had in respect to it is binding on all the world, and will be so regarded in every

¹ Griffith *v.* Fowler, 18 Vt. 390, 394.

² Ibid.; The Monte Allegre, 9 Wheat. 616; Haight *v.* Steamboat Henrietta, 4 Iowa, 472 475; Phegley *v.* Tatum, 33 Mo. 461; The Mary, 9 Cranch, 126, Story, Confl. Laws, Secs. 592, 593; The Mary Anne, Ware C. C. 104; Croudson *v.* Leonard, 4 Cranch, 434; Gelston *v.* Hoyt, 3 Wheat. 246, 313; French *v.* Hall, 9 N. H. 137; 3 Kent Com. 132; Penhallow *v.* Doane, 3 Dall. 86; 2 Bac. Abt. 74; Benedict, Admir., Secs. 364, 434; The Commander-in-Chief, 1 Wall. 43, 52; McCall *v.* Elliott, Dudley, (S. C.) 250; Singleton *v.* Herriott, Dudley, (S. C.) 254.

³ Grignon's Lessee *v.* Astor, 2 How. 338; Beauregard *v.* New Orleans, 18 How. 497, 502, 503; Benedict, Admir., Secs. 364, 434.

⁴ The Belfast, 7 Wall. 624; Stratton *v.* Jarvis, 8 Pet. 4, 11; Mitchell *v.* Steamboat Magnolia, 45 Mo. 67; Phegley *v.* Tatum, 33 Mo. 461.

other tribunal and country, unless set aside or reversed by some appellate tribunal competent to review the same.¹ And though it is held in many cases of high authority that such validity will not be conferred unless there be notice to the parties interested in the property seized, so that they may defend such interest;² yet, in proceedings *in rem*, the notice is served on the thing;³ and it is questionable, except as to foreign courts, whether the omission, where the proceedings are *in personam* also, as well as *in rem*, will amount to more than mere error and cause for reversal of judgment against the same, if jurisdiction over the property has, by proper proceedings and seizure, actually attached.⁴ But as to a judgment *in personam*, want of notice is want of validity.

§ 511. Being made by order of the court, such sales are not within the statute of frauds.⁵

§ 512. The form of proceedings in courts of admiralty in matters of ordinary admiralty jurisdiction is in conformity to the civil and maritime law; but the powers exercised in dispensing justice and settling rights of property are those of courts of equity; and justice is administered upon equity principles.⁶ Therefore, in their orders and decrees in proceedings *in rem*, the courts act upon the thing or property itself, which is the subject matter of the proceeding;⁷ and sales thereon are judicial sales, as is herein before stated, in their strictest sense.

¹ The Siren, 7 Wall, 152; The Propeller Commerce, 1 Black. 574, 581; The Reindeer, 2 Wall. 385, 388, 403; Phegley *v.* Tatum, 33 Mo. 461; Story, *Confl. of Laws*, Secs. 592, 593; Croudson *v.* Leonard, 4 Cranch, 434; Monroe *v.* Douglass, 4 Sandf. Ch. 180; Whitney *v.* Walsh, 1 Cush. 29; Grant *v.* McLachlin, 4 Johns. 84; The Mary Anne, Ware C. C. 104; Holmes *v.* Remsen, 20 Johns. 229; Barrow *v.* West, 23 Pick. 270; Peters *v.* Warren Ins. Co., 3 Sumner C. C. 389; Magoun *v.* New Eng. Ins. Co., 1 Story C. C. 157; Williams *v.* Armroyd, 7 Cranch, 423; Bradstreet *v.* Neptune Ins. Co., 3 Sumner C. C. 600.

² Bradstreet *v.* Neptune Ins. Co., 3 Sumner C. C. 600; Monroe *v.* Douglass, 4 Sandf. Ch. 180; Story, *Confl. of Laws*, Sec. 592.

³ Benedict, *Admr.*, Sec. 365.

⁴ Williams *v.* Armroyd, 7 Cranch, 423, 603; Grignon's Lessee *v.* Astor, 2 How. 338; Beauregard *v.* New Orleans, 18 How. 497; Iverson *v.* Loberg, 26 Ill. 182; Thompson *v.* Tolmie, 2 Pet. 167; Parker *v.* Kane, 22 How. 1, 14; U. S. *v.* Arredondo, 6 Pet. 709; The Globe, 2 Blatch. 427.

⁵ The Monte Allegre, 9 Wheat. 616.

⁶ Plummer *v.* Webb, 4 Mason, 380, 387; 1 Kent Com. 354; Delovio *v.* Boit, 2 Gallison, 398; 3 Greenleaf, Evid. Secs. 388, 389; Benedict, *Admr.* Sec. 358.

⁷ Benedict, *Admr.* Sec. 359.

§ 513. The principle is fully settled that the seizure and sale of vessels in cases purely in admiralty, in the courts of admiralty, by proceedings *in rem*, divests all prior liens and claims whatever; and that the holders thereof must look to the fund in court arising from the sale for such rights as the nature of their claims may command, which fund is subject to distribution by the court.¹

In such proceedings and sales, the validity of the sales does not depend upon any personal judgment against the owner or master, but the proceeding are purely *in rem*, and of them the United States courts have exclusive jurisdiction. The decree is against the property itself, and all the world are barred by the decree and sale.²

In *Williams v. Armroyd*,³ that great jurist, MARSHALL, Chief Justice, holds the following language on the subject of the force of sales in admiralty: "It appears to be settled in this country that the sentence of a competent court, proceeding *in rem*, is conclusive in respect to the thing itself, and operates as an absolute change of the property. By such sentence the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of co-ordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to a general municipal law can never arise, for no co-ordinate tribunal is capable of making inquiry." This case involved title under a government sale of vessel and cargo made at St. Martins, by an order of decree of the Governor; and although such decree was repudiated by our government as in violation of international and maritime law, yet as Congress had not gone so far as to declare the sale void, and require it to be so treated in our courts, the Supreme Court felt bound, on principles of maritime law, to treat it as of binding force, and to recognize the validity of the sale. Upon this branch of the subject the learned judge, in the same case, gives the opinion of the court in the following terms: "The sale was made on the application of the captor, and the possession of the vendee is a continuance of his possession. The capture is made by and for

¹ Remnants in Court, Olcott, 382; Bracket *v. The Hercules*, Gilp. 184; Harper *v. The New Brig*, Gilp. 536; *The Amelie*, 6 Wall. 18.

² *The Mary Anne*, Ware C. C. 104; *The Siren*, 7 Wall. 152; *Williams v. Armroyd*, 7 Cranch, 423; Benedict, Admir. Sec. 364.

³ 7 Cranch, 423, 433, 434.

the government, and the condemnation relates back to the capture, and affirms its legality.” Then, again, in the same case, it is said that, “If an erroneous judgment binds the property on which it acts, it will not bind that property less because its error is apparent. Of that error advantage can be taken only in a court which is capable of correcting it.”¹

§ 514. In maritime cases, in the United States courts, it matters not to the contrary that the sale be made on a species of execution, and by the ordinary ministerial officer, the sale is nevertheless a judicial sale. The writ is but a statutory method of executing the decree or judgment of condemnation and order of sale;² unlike the ordinary execution, it points out the property to be sold. No levy is necessary, and the proceeds of sale are to be returned into court to be disposed of as that tribunal may direct.³ The officer is the mere agent of the court to carry its order and authority into effect.⁴

II. IN ORDINARY COURTS OF LAW AND EQUITY.

§ 515. And so proceedings in the State courts for the enforcement of liens and pledges against boats and vessels, and other personal property not maritime in its nature, are within the ordinary equity powers of chancery courts, whether such liens rest upon express contract or arise by implication of law. To that end such courts, on application by bill or petition, if equity shall require it, will decree a sale of the property to satisfy the debt, and will cause such decree to be carried into effect by the appointment of a commissioner or master to conduct the sale, and he is to produce in court the fund arising therefrom, subject to the final order of the court.⁵

¹ Williams *v.* Armroyd, 7 Cranch, 423, 433, 434.

² Conk. Dig. 1st Ed. 388; Act of Congress, March 2, 1799, Sec. 90. In England the sale is by a commissioner of the court. Abbott on Shipping, 210 et seq. In the United States courts by the marshal. Ibid. Griffith *v.* Fowler, 18 Vt. 390, 394.

³ The Phebe, Ware C. C. 354; Andrews *v.* Wall, 3 How. 568, 573; Act of Congress, March 2, 1799, Sec. 90; Conk. Dig. 1st Ed. 388; The Siren, 7 Wall. 152.

⁴ Hurt *v.* Stull, 4 Md. Ch. Dec. 391, 393; Inglehart *v.* Armiger, 1 Bland. 527; Mason *v.* Osgood, 64 N. C. 467, 468; Bozza *v.* Rowe, 30 Ill. 198; Armor *v.* Cochrane, 66 Penn. St. 308; Coffey *v.* Coffey, 16 Ill. 145; Moore *v.* Shultz, 13 Penn. St. 102; Sowards *v.* Pritchett, 37 Ill. 517.

⁵ Black *v.* Brennan, 5 Dana, 311, 313; 2 Story Eq. Jur. Sec. 1033; 4 Kent Com. 139; Ambler *v.* Warwick, 1 Leigh. 495, 205, 207; 2 Hilliard on Mortgages, Appendix No. 1, Sec. 38.

§ 516. Such proceedings being *in rem*, the jurisdiction (unless so enlarged by statute) does not extend to the making of any personal order or decree against the owner of the property in case the fund arising from the sale be insufficient to satisfy the demand.¹

§ 517. Some of these cases are kindred in their nature to admiralty cases, as for instance proceedings *in rem* against water crafts, under State laws, to enforce liens, or else to obtain and enforce liens against such crafts for materials and supplies furnished in home ports, which do not come within the admiralty jurisdiction of the United States.

§ 518. It is well settled that the respective State courts have jurisdiction to enforce liens created and originating under their laws, for labor and material furnished in constructing and repairing domestic vessels in the home ports of such.² The residence of the owner determines the home port of the vessel,³ and the fact of her being registered elsewhere, as in the port of a different State, by one having only a mortgage on her, has no contrary influence.⁴

But this jurisdiction of a State court as against boats and vessels does not extend, and can not, by State legislation, be extended to the adjudication or enforcement of liens strictly maritime in their nature.⁵

§ 519. The effect of such proceedings and sale thereof varies in the several States under the impress of local law. But there are certain principles that run alike through the whole. The vessel must be within the territorial jurisdiction of the court or jurisdiction can not be obtained; and being so within such jurisdiction, then jurisdiction over the thing actually attaches by

¹ Black *v.* Brennan, 5 Dana, 311, 312.

² Maguire *v.* Card, 21 How. 248, 250; The Belfast, 7 Wall. 624; Foster *v.* The Richard Busteed, 100 Mass. 409; McMonagle *v.* Nolan, 98 Mass. 320; Donnell *v.* The Starlight, 103 Mass. 227, 230.

³ Donnell *v.* The Starlight, 103 Mass. 227, 230, 231.

⁴ Ibid. And such domestic lien, as also for supplies, has priority over existing mortgages and all other liens, except mariners' wages. It gives the laborers and material men an interest in the vessel to the extent to which they have added to its value, with precedence over all liens and incumbrances other than mariners' wages. Donnell *v.* The Starlight, supra; The Granite State, 1 Sprague, 277.

⁵ Dever *v.* Steamboat Hope, 42 Miss. 715; The Moses Taylor, 4 Wall. 411; The Hine *v.* Trever, 4 Wall. 555; The Belfast, 7 Wall. 624.

corporal seizure thereof under the process of the court, and continues only during such corporal restraint and possession, unless released under some provision of law, as on a forthcoming bond or other similar provisions.¹

§ 520. In such proceedings *in rem*, under State laws, it matters not whether the proceedings purport in form to be at law or in chancery, or in neither one or the other exclusively, as in some modern creations of pleadings. In either case the order of condemnation and sale is made and is executed in the exercise of more or less equity power, and the sale being made by express adjudication of the court pointing out the property to be sold, is judicial in its character. The property is already in the custody of the court by the original seizure and judgment of condemnation and sale. No new levy is necessary, and whether the sale be conducted by the sheriff or by a master, the result is the same. It is carrying out the order of the court, and not the exercise of any separate authority irrespective of such order and ministerial in character.

§ 521. But the rule is different where the proceedings are *in personam* as well as *in rem*, as in selling boats and vessels under a mortgage decree while the property is absent on a voyage and the sale is made in the registry port, if the court obtain jurisdiction of the persons of the owners, as parties defendants, then the proceedings are *in personam* as well as *in rem*, and the court has full power to adjudicate and act on the rights of the parties in the property without regard to its presence, as the ends of justice may require, and to the *personal* judgment or decree may add such decree *in rem* or against the property itself, specifically, as will pass the ownership thereof upon proper sale.²

And though the order be to sell in the manner of selling on writs of execution, that is not to be taken as requiring the presence of the property at the sale, but as having reference to the notice to be given.³

§ 522. A *bona fide* purchaser of personal property, at a sale purely judicial, as one made on a seizure, condemnation and order of sale of a water craft in proceedings *in rem*, under the

¹ Bradstreet *v.* Neptune Ins. Co., 3 Sumner, 600.

² Means *v.* Worthington, 22 Ohio St. 622; Booth *v.* Clark, 17 How. 832; Portarlington *v.* Soulby, 3 Mylne & K. 104, 108.

³ Means *v.* Worthington, *supra*.

statute for enforcing claims against boats, takes the title to the property, in Ohio, free from all ordinary liabilities. The seizure on process creates a lien, and the proceedings perfected by condemnation and sale cuts off all existing claims or mere liabilities which are not in themselves liens entitled to priority.¹ The case last cited was a proceeding under the Ohio statute, which gives the creditor the right to proceed against the owner or master of a water craft, "or the craft itself," and provides for its seizure and detention, and for its subsequent sale on execution to satisfy the judgment of the court. The Supreme Court of Ohio say: "From the time of this seizure a lien is created, the property is bound and may be sold on execution." The court remark that this construction of the act aids "the vigilant creditor, by allowing to him the same advantage that one secures to himself, by making a levy on personal property." And that "the lien first attaching by virtue of the seizure will be first satisfied, and so on in the order of priority," if the proceeds of sale are more than the amount of the first lien and costs. "The first judicial sale (say the court) then must pass the entire interest and vest in the purchaser a perfect title."²

§ 523. In the case of *Phegley v. Tatum*,³ the Supreme Court of Missouri, recognizing the rule in admiralty courts of exclusive jurisdiction of maritime liens, and that all the world are bound by their action *in rem* upon such subjects, denies that there is any analogy between such and suits prosecuted in the State courts of that State to enforce liens against boats and vessels under the local statute. The court say of sales in the regular court of admiralty: "Such sales are not made for the benefit of every particular creditor, but for the benefit of all persons interested." * * * "The proceeding is entirely *in rem* and all the world are bound by it." Whereas the benefits of the Missouri statute "are confined to persons in Missouri, or making contracts in Missouri;" and the "effect of a sale under the Missouri law," is to "divest only the liens existing under that law." Therefore, that as sales in Missouri do not affect the liens of strangers resident in Illinois or other States, but as against such persons operate only as would private sales, so, on the other

¹ *Jones v. Steamboat Commerce*, 14 Ohio, 408.

² *Ib^d*.

³ 33 Mo. 461, 466, 467; *Haight v. Steamboat Henrietta*, 4 Iowa, 472, 475.

hand, like sales under the statutes of other States are not maintainable in Missouri as against liens existing under the statute of Missouri. Such, too, is virtually the ruling, in Iowa, in reference to liens arising under the laws of Missouri.

§ 524. Under the Ohio statute the claim against the water craft is not *per se* a lien, nor does the statute make it a lien; but merely provides a way by which a lien may be obtained. That is by seizure on process in accordance with the provisions of the statute.

§ 525. Whether such seizure and sale will cut off prior liens already existing, is not expressly determined in the case above referred to; but the court declare such sale to be unlike a private sale, wherein the purchaser takes only the interest of the vendor and holds the property as the vendor held it in all purchases where the purchaser had notice of a claim against the same at the time of his private purchase. The claim follows the boat into whosesoever hands the vessel goes, whether by private sale or hire, and is capable to be matured by judicial proceedings into a lien against it. But claims that are not so matured are cut off by a seizure and judicial sale just as a prior attachment over-reaches a subsequent one. In the language of the court, "the judicial sale is the act of the law."¹

This equitable jurisdiction extends only to the enforcement of the lien,² and does not authorize any order or decree against the person.

§ 526. In cases of bailment where the lien is for benefits bestowed or labor performed on the property, the expenses of subsequent keeping attach to the liability and become a part of the lien, whenever the party has a right to retain possession as security for his demand. He has "a lien upon the property itself for the reimbursement of his reasonable expenditures in keeping and providing for it, though he keep it merely for his own security."³ In the enforcement of the lien judicially by decree and sale, these additional expenditures will be included and satisfied as if part of the original liability, so far as they are

¹ Jones *v.* Steamboat Commerce, 14 Ohio, 408, 413; Steamboat Waverley *v.* Clements, 14 Ohio, 28, 37.

² Black *v.* Brennan, 5 Dana, 310, 311, 312; Long Dock Co. *v.* Mallery, 1 Beasley Ch. 94, 96.

³ Black *v.* Brennan, *supra*.

reasonable, necessary and just. Or when the property is expensive to keep or is perishable, it may be sold under interlocutory order and the funds be held to answer the final decree.¹

§ 527. Although the furnishing material and supplies to a vessel in her home port does not create in itself a lien under the maritime law, and enforceable in the courts of the United States, yet where, by the local law of the State wherein such materials and supplies are furnished to vessels in their home port, a specific lien is given upon the vessel, such lien is enforceable as a maritime lien in the District Courts of the United States by proceedings *in rem*.²

III. THERE IS NO WARRANTY.

§ 528. The maxim *caveat emptor* is applied in all its force to judicial sales of personal property. There is no warranty, in law, for there is no one to fall back on. The person selling is the mere instrument of the court to carry out the law, and is not liable, if guilty of no fraud; and if he warrants expressly, he then binds himself individually; but the warranty affects no one else.³ The case of *Prescott v. Holmes*, cited in the notes, involved a sale made by an administrator under an order in probate; and it is held therein that in such sales there is no warranty; the rule of *caveat emptor* applies.

¹ *Ibid.* 313; *Long Dock Co. v. Mallory*, 1 Beasley Ch. 94.

² *The Lottawanna*, 21 Wall. 558.

³ Case of the *Monte Allegre*, 9 Wheat. 616; *Prescott v. Holmes*, 7 Rich, Eq. 9; *Evans v. Dendy*, 2 Spears, L. 9; *Fuller v. Fowler*, 1 Bailey, L. 75.

⁴ *Brackenridge v. Dawson*, 7 Ind. 383; *Young v. Lorain*, 11 Ill. 624.

CHAPTER XII.

JUDICIAL SALES OF CORPORATE FRANCHISES, PROPERTY AND STOCKS.

§ 529. Though the corporate right to operate a railroad and receive the earnings and tolls may result from a judicial sale and purchase under a decree of foreclosure and sale on a mortgage, yet, by such decree, foreclosure and sale the corporate existence and franchise of such company will not pass to the purchaser. That is, "the capacity to have perpetual succession under a special name, and in an artificial form, to take and grant property, contract obligations, and sue and be sued by its corporate name as an individual," are "franchises belonging to the individual stockholders," and will not pass to such purchaser; that although the company "may be divested of its property, together with the franchise of operating and making profit from the use of its road, its corporate existence survives the wreck and endures until the State sees fit to terminate it by proper proceeding."¹

§ 530. In the case of the Canal Company,² the court hold as follows in reference to forced sales of such interests. SERGEANT, Justice: "The spirit of the decision in *Ammant v. Alexandria and Pittsburg Transportation Company*, seems to be that privileges granted to corporations to construct turnpike roads, canals, etc., are conferred with a view to public use and accommodation, and that they can not voluntarily deprive themselves of the lands and real estate and franchises which are necessary for that purpose; nor can they be taken from them by execution and sold by a creditor, because, to permit it, would tend to defeat the whole object of the charter, by taking the improvements out of the hands of the corporation and destroying their use and benefit." * * * * "The remedy for creditors, in such case," say the court, is by sequestration, as was

¹ Atkinson *v.* M. & C. R. R. Co., 15 Ohio, 21, 36; Coe *v.* Columbus and Ind. R. R. Co., 10 Ohio St 372; Susquehanna Canal Co. *v.* Bonham, 9 W. & S. 27; Ammant *v.* New Alex. & Pitts. Turnpike Co., 13 S. & R., 210.

² Susquehanna Canal Co. *v.* Bonham, *supra*.

suggested by Chief Justice TILGHMAN, and has since been provided for by statute.

§ 531. And where, as in Ohio, it is by the constitution provided that "the General Assembly shall pass no special act conferring corporate powers," it is held that a special act of assembly declaring that such mortgage sale shall carry the corporate franchise to the purchaser is unconstitutional and void; and that though the right to operate the road and receive the proceeds thereof would pass thereby, the sale being regular in other respects; that yet, the corporate capacity and existence still remained in the stockholders, and that the attempt by such act of assembly to confer the corporate capacity of the debtor corporation on the purchasers at such judicial sale was tantamount to an attempt to create a corporation by special enactment, and was then inoperative and void. That what the General Assembly can not do directly, it can not do indirectly. The court say, aside from this act of assembly: "It is certain that the mortgagees, as such, were invested with no corporate capacity, and it is equally certain that a mere purchase at the sale would have invested them with none." So that, without the enactment, it could not pass, and that it would not pass by the enactment, which in itself was unconstitutional and void.¹

§ 532. But in Pennsylvania, under somewhat similar conditions, the ruling is contrary. There the act of assembly, after conferring power to mortgage the property and franchise, declared that, "in the event of a sale being made of the estate, right and franchises of said company, under or by virtue of the provisions of any mortgage created under this or any other act, the purchaser or purchasers, their associates and assigns, shall thereupon become a body politic or corporate, under the name of the Westchester Direct Railroad Company, and, as such, be entitled to succeed to all the estate, rights and privileges of said company." The court held that a mortgage so made under said act carried with it the right to have the mortgaged property and franchise sold for non-payment of the debt according to the terms of the obligation.²

¹ Atkinson *v.* M. & C. R. R. Co., 15 Ohio St. 21, 36, 38.

² Mendenhall *v.* Westchester & Phila. R. R., 36 Penn. St. 145 and 147 note; Stewart's Appeal, 72 Penn. St. 291; Vilas *v.* Milwaukee & Prairie du Chien R. R. Co., 17 Wis. 497; Smith *v.* Chicago & N. W. R. R. Co., 18 Wis. 17.

§ 533. Where, through the fraudulent acts and procurement of the directors of a railroad company, its franchises, road, and rolling stock were sold at judicial sale, under a mortgage decree for a nominal sum compared with their real value, and thereby the just claims of other creditors were to be cut off and their interests sacrificed, it was held by the Supreme Court of the United States that the purchasers at the mortgage sale, who had in the meantime despoiled the road by taking up and selling the material at great profit, should be "held liable as trustees" to the injured creditors, "for the full value of the property purchased" at the mortgage sale, after deducting therefrom the amount of the judgment at the day of sale paid by them and under which they bought.¹

§ 534. A judicial sale under a mortgage decree of foreclosure of a railroad and its franchises will not carry title to the mere easement or right of way of the road at places where the damages for the same, though assessed, have not been paid, although the mortgage deed be of subsequent date to the taking and occupancy of the easement. Until paid for, the right to the easement does not vest in the company, and consequently there could be no title in the company to the easement at the date of the mortgage to which the mortgage lien could attach as against the original land owner, or as against his prior right to enforce compensation for his damages for right of way.²

§ 535. Although as a general principle in Pennsylvania, the courts will not assume chancery jurisdiction to decree a mortgage foreclosure, or a foreclosure and sale on a mortgage,³ yet they will do so in cases of insolvency, bankruptcy, or death of the mortgagor,⁴ and will also "take jurisdiction of a trust created in a mortgage, and will compel trustees to execute whatever powers have been vested in them for the benefit of creditors, even to the sale of the mortgage premises on a proper case made."⁵

¹ Drury *v.* Cross, 7 Wall. 299.

² Western Penn. R. R. *v.* Johnston, 59 Penn. St. 290; Pheifer *v.* Sheboygan & Fond du Lac R. R. Co., 18 Wis. 155.

³ Bradley *v.* The Chester Valley R. R., 36 Penn. St. 141, 155; Ashhurst *v.* The Montour Iron Co., 35 Penn. St. 30.

⁴ Mendenhall *v.* Westchester & Phila. R. R., 36 Penn. St. 145, n. and other cases there cited.

⁵ Bradley *v.* The Chester Valley R. R., *supra*.

But default to pay the interest, merely, on its unmatured mortgage bonds, by a railroad company, does not authorize a decree compelling the trustees in the mortgage to exercise their powers of sale and sell the road and franchises of the company, when their power to sell is in the mortgage based upon the maturity of and default to pay the bonds.¹

In the case of *Mendenhall v. Westchester & Phila. R. R.*,² the court say: "We have already indicated the general rule drawn from the civil law, that nothing can be conveyed in mortgage except things which may be sold. This is the reason why a railroad corporation, holding its franchise for public use, although its tolls are for the private benefit of the stockholders, can neither sell nor mortgage its franchises." (That is apart from statutory authority so to do.) "But when the legislature authorized it to execute a mortgage" to secure a debt, such mortgage "carries with it a right to have the mortgaged property and franchise sold on non-payment of the debt, according to the terms of the obligation." And more especially, "where, as in the case before us, the road is unfinished, and there are no tolls or other means of collecting the debts by sequestration."

§ 536. Under the statute in Wisconsin, a railroad company becomes the owner in fee of the real estate taken for right of way, or on which to construct its road; and by the laws of that State the rolling stock of such company is a fixture to such realty, and is a part thereof.

Judgments at law are by law, in that State, liens upon the real estate of judgment debtors. Hence it follows that a judgment in that State against a railroad company is a lien upon such real estate and fixtures of the company, and that a sale thereof under a decree in chancery, to satisfy such judgment and conveyance made in pursuance thereof, (the sale being confirmed by the court,) carries to the purchaser title to the whole interest of the company, as fully as it existed at the time of the rendition of such judgment.³

§ 537. A mortgage sale of the railroad was set aside at the suit of judgment creditors, as fraudulent and void, where the foreclosure was nominally for an amount greatly in excess of

¹ *Bradley v. The Chester Valley R. R.*, 36 Penn. St. 141, 155.

² 36 Penn. St. 145, n.

³ *Railroad Co. v. James*, 6 Wall. 750.

the real indebtedness, the notice of sale was of a similar character. The mortgagee acting as auctioneer, and as such bid in the property for certain of the bondholders and directors who had made the mortgage.

The Supreme Court of the United States, NELSON, Justice, hold the following language in reference to the transaction:

"It needs no authorities to show that such a sale can not be upheld without sanctioning the grossest fraud and injustice to the mortgagor and its creditors." "The deceptive notice was calculated to destroy all competition among the bidders, and indeed, to exclude from the purchase every one except those engaged in the perpetration of the fraud. The sale therefore must be set aside and the Milwaukee and Minnesota Company be perpetually enjoined from setting up any right or title under it, the mortgage to remain as security for the bonds in the hands of *bona fide* holders for value, and that the judgment creditors, the complainants, be at liberty to enforce their judgments against the defendants therein, subject to all prior liens or incumbrances."¹

§ 538. The enforcement of judgments at law against private corporations, and the carrying out the rights of execution purchasers on sales of the right to take tolls, where such sales are allowed by statute on execution against such corporations, are fit subjects of equity jurisdiction.

Such jurisdiction results from the incompetency of courts of law to afford sufficient or certain relief. The nature of the interest to be reached, is such, from their intangibility as to preclude the ordinary remedy of corporeal possession, which results from execution sales of goods and chattels and of real estate. On such sales of goods and chattels, possession of the property is delivered to the purchaser by the officer selling; and on sales of the realty, the purchaser has his action at law for possession of the property. But on execution sale (if such sales be permissible) of a franchise, a mere easement, or the right to take tolls, no such possibility follows; and a court of law is incompetent to put the purchaser into possession of the fruits of his purchase.²

In *Covington Draw Bridge Co. v. Shepherd*,³ the Supreme

¹ Railroad Co. *v.* James, 6 Wall.

² *Covington Draw Bridge Co. v. Shepherd*, 21 How. 112; *Macon & Western R. R. v. Parker*, 9 Geo. 378.

³ 21 How. 124.

Court of the United States, CATON, Justice, say of the power of the court of law to meet out a suitable remedy in such cases, that, "One thing, however, is plainly manifest, that the remedy at law of these execution creditors is exceedingly embarrassed, and we do not see how they can obtain satisfaction of their judgments from this corporation (owning no property but this bridge) unless equity can afford relief."

In the case of *The Macon & Western Railroad Co. v. Parker*, the Supreme Court of Georgia hold the following language in reference to the same subject: "The whole history of equity jurisprudence does not present a case which made the interposition of its powers not only highly expedient, but so indispensably necessary in adjusting the rights of creditors to an insolvent estate, as this did."¹

§ 539. In such cases, when there is not tangible property subject to levy and sale belonging to the company, a court of equity will give relief by appointing a receiver to take charge of and manage the corporate property, receive the tolls and income of the corporation from whatever source they may emanate, and account for the same to the court, to the end that they be applied to the extinguishment of the judgments and executions existing against the company, according to their respective rights, first defraying the costs, charges, and expenses of the operation and proceedings out of the same.² In the case of *The Covington Draw Bridge Co. v. Shepherd*, there were two judgment creditors holding judgments in the circuit court of the United States for the district of Alabama. The one sold and bought in on execution the right of the corporation to the tolls of the road; but finding his purchase ineffectual as to any more than a nominal satisfaction of the writ, and leaving him no means of obtaining actual payment, he joined with the other judgment creditor in a bill in chancery for the appointment of a receiver to take charge of the franchise and corporate property, and operate it in satisfaction of their demands. A decree was accordingly entered granting the relief prayed for; from this decree the case went to the United States Supreme Court, which affirmed the decree of the court below.³

¹ 9 Geo. 393, 394; *Covington Draw Bridge Co. v. Shepherd*, 21 How. 112.

² *Covington Draw Bridge Co. v. Shepherd*, supra.

³ *Ibid.* 125.

The corporation and franchise to take toll were created by act of the legislature of Indiana. By the law of said State it is enacted that, "the property, rights, credits, and effects of the defendants are subject to execution." But not the lands, until the rents and profits for a term of years are first offered. Under this state of the law, "the tolls, under the idea that they were rents and profits of the bridge, (say the court,) were sold for one year, according to the forms of the law. The tolls of the bridge being a franchise and sole right in the corporation, and the bridge a mere easement, the corporation not owning the fee in the land at either bank of the river or under the water, it is difficult to say how an execution could attach to either the franchise or the structure of the bridge as real or personal property. This is a question that this court may well leave to the tribunals of Indiana to decide, on their own laws, should it become necessary." The Supreme Court, after reviewing the whole subject, then add in conclusion, that "all that we are called on to decide in this case is, that the court below had power to cause possession to be taken of the bridge, to appoint a receiver to collect tolls and pay them in to court, to the end of discharging the judgments at law, and our opinion is, that the power to do so exists, and that it was properly exercised."

§ 540. And by still later rulings the doctrine is reaffirmed in some of the States that a judicial sale of a railroad, under a mortgage foreclosure, carries to the purchasers all the property, rights and credits of the debtor corporation covered by the mortgage, together with its franchises.¹ And if there be a statute creating such purchasers a body corporate, then, by such sale and purchase, they become a new corporation, and there is no *priori-ty* of interest or existence between the old corporation and the new, and the new one is not liable for debts of the old one; neither are the assets of the old one any longer liable for the debts of the old one, for by the sale and purchase they are now the property of the new corporation.² Nor does it matter, if the sale be *bona fide* and without any previous understanding thereto, the stockholders in the old company be allowed to become such in the new one before actual organization, even without payment

¹ Stewart's Appeal, 72 Penn St. 291; Vilas v. Mil. & Prairie du Chien R. R. Co., 17 Wis. 497; Smith v. Chicago & N. W. R. R. Co., 18 Wis. 17.

² Stewart's Appeal, 72 Penn. St. 291.

for such stock as may be accorded to them.¹ Such, too, is the law, although the new company take the name of the old one.² But not so if there be evidence of fraud or collusion between the old stockholders so admitted into the new corporation and the purchasers at the sale to bring about such purchase and sale. In such case equity regards the transaction as fraudulent.

§ 541. Only those become recipients of the funds arising from judicial sale of the franchise and property of a railroad who are designated as entitled thereto in the decree.³

And creditors deferred as to payment by the decree, whose claims are of the nature of trust bonds, are sufficiently in court to be bound by the decree, if their trustee is a party defendant. It is not necessary that the bondholders be made defendants in their respective persons,⁴ nor indeed practicable where the bonds are payable to bearer and pass by delivery from hand to hand. The bondholders can not be certainly known.

§ 542. Though the easement or right of way of a railroad corporation for its railroad is, in contemplation of law, perpetual in character, and when paid for by the company passes by forced sale of the road to the purchaser, made by authority of law,⁵ yet the judicial sale of a railroad, as under mortgage foreclosure, is held in Pennsylvania to not invest the purchaser with an unpaid for right of way not in any manner parted with to the company by the landholder, and there is no act of his postponing to such mortgage claim his right to compensation, or any act done or submitted to by him which will estop him from enforcing payment. His rights in that respect are held to be as valid against the new owner as they were against the former original one, and compensation may be enforced against the purchasers.⁶ But such purchasers of the defendant's road may perfect their right to the easement by assessment and payment therefor under the statute;

¹ Stewart's Appeal, 72 Penn. St. 291.

² Vilas v. Mil. & Prairie du Chien R. R. Co., 17 Wis. 497; Smith v. Chicago & N. W. R. R. Co., 18 Wis. 17.

³ Stewart's Appeal, 72 Penn. St. 291; Railroad Co. v. Howard, 7 Wall. 392. But *quære?* If the very circumstance of such subsequent admission to the benefits of the purchase is not in the eye of equity evidence *prima facie* of collusion?

⁴ McElrath v. Pittsburgh & Steubenville R. R. Co., 68 Penn. St. 37.

⁵ Ibid.

⁶ Junction R. R. Co. v. Ruggles, 7 Ohio St. 1, 7.

⁷ Western Penn. R. R. Co. v. Johnston, 59 Penn. St. 290.

and if recovery be obtained against them in an action of ejectment by the owner of the land, equity will stay proceedings under a writ of possession a sufficient length of time to enable such assessment to be made, and thus enable the new company or purchasers to preserve the franchise intact.¹

§ 543. In judicial sales of tangible property, or interests of a personal character, the officer selling has possession thereof, and passes it over by delivery to the purchaser; but with regard to shares of capital stock in a private corporation it is different in this, that, being intangible, and therefore incapable of corporeal seizure and delivery over to the purchaser, it is the interest and title thereof that is sold, and to pass the same it is necessary to transfer it upon the books of the corporation in the manner prescribed by the by-laws and charter. This it is the duty and right of the officer selling, ordinarily, to do;² but inasmuch as the books may not be accessible to the officer, it is in some of the States provided by statute that the officer selling shall deliver a certificate of purchase to the buyer, and that on presentation thereof to the proper officer of the corporation, the law makes it his duty to perfect and carry out the transfer upon the books of the company, and furnish the purchaser with such evidence of title (ordinarily stock certificates) as is usual and necessary in regard to other stockholders. Such is the statutory requirement in Georgia.³ If the officer of the corporation on whom this duty devolves, under the law, refuse to make the necessary transfer of the stock upon the books of the company, and to deliver to the purchaser the proper and ordinary evidence of title to the same, as is required by the statute, the performance of that duty will be enforced, under the laws of Georgia, by writ of mandamus.⁴

§ 544. A sale of railroad capital stock under decree of a so-called confederate court of the confederate government is void for illegality and want of authority of the supposed court, and therefore the purchaser takes nothing by his purchase.⁵ Such confederate tribunal, being the creature of an illegal organization, is itself powerless to confer legality on its proceedings.⁶

¹ Pittsburgh & Steubenville R. R. Co. v. Jones, 59 Penn. St. 433.

² Bailey v. Strohecker, 38 Geo. 259.

³ Ibid.

⁴ Ibid.

⁵ Central R. R. & Banking Co. v. Ward, 1 Withrow's Corp. Cases, 299.

⁶ Ibid.

CHAPTER XIII.

SETTING ASIDE JUDICIAL SALES.

- I. THE POWER TO SET THEM ASIDE.
- II. FOR INADEQUACY OF PRICE.
- III. FOR IRREGULARITY.
- IV. FOR MISTAKES AND FOR MISREPRESENTATION.
- V. FOR SURPRISE.
- VI. FOR FRAUD.
- VII. ON ACCOUNT OF REVERSAL OF THE DECREE.
- VIII. RESALE.

I. THE POWER TO SET THEM ASIDE.

§ 545. Courts of equity, and courts exercising equity powers over particular subjects have a "general supervision over their process, and more especially over the particular sales ordered by their decrees and made by their special agents or commissioners," which supervision is effected sometimes by bill or by petition, and sometimes by motion,¹ or by the court itself, on its own

¹ Coffey *v.* Coffey, 16 Ill. 141; Deaderick *v.* Smith, 6 Humph. 138; King *v.* Platt, 37 N. Y. 155; Laight *v.* Pell, 1 Edw. Ch. 577; Yates *v.* Woodruff, 4 Edw. Ch. 700. In the case of Coffey *v.* Coffey, SCATES, Justice, delivering the opinion of the court, says: "The only question of any importance in the case is, whether there is such unfairness and fraud in the sale as to warrant the decree setting it aside. Of this we have no doubt. The plaintiff, with his brothers and sisters, had, or pretended to have, a claim of title to one of these tracts adverse to petitioners. Under these circumstances, if he desired to become a bidder, it was essential to fairness toward petitioner that he should conceal or forbear to assert his adverse claim, whatever consequence might result therefrom to his interest. It is not competent for him to assert his claim to the premises by a public announcement at the biddings, with a threat to litigate it with any purchaser, and then enter into competition in the biddings and purchase at an under value, occasioned by the depreciation his own conduct had produced. If it were essential for the protection of his claims to give notice and make it known at the sale, he thereby disqualified himself to bid or become a purchaser of this adverse title at such sale. He shall not be allowed to depreciate or destroy the value of the land by denying the title, then buying it at a depreciation thus produced, and claim to be a fair purchaser. Such is proven to have been his conduct in this case. A witness desired to purchase the tract claimed, and would have paid more for it than plaintiff gave had not this claim been made. So he would for the other, to which no claim was made, if he could have purchased with

motion, as universal guardian of all infants, if the interest of infants demands it.¹ They may reject, set aside, or confirm sales, and order resales, at discretion, as equity and the ends of justice may require.²

In *Deaderick v. Smith*³ the Supreme Court of Tennessee use

it the piece claimed. Its value depended in part upon its connection with that piece. Another witness, though he had no money to bid, yet desired the land, and actually purchased the same of plaintiff before he bid on it at an advance of some five hundred dollars, on time. These facts show such fraud upon and injury to the rights and interests of defendant as call for correction from the court, in the exercise of a sound legal discretion of its powers of disapproving and setting aside sales under its orders; and we think that discretion properly exercised in this case. The objection taken to the proceedings by motion is not sustainable. The case is essentially different from the case of *Day v. Grayham*, 1 Gilm. 435. Courts of law have a supervision over the execution of their process, and yet may not, as in that case, properly afford relief by setting aside sales made under it, but leave the party to his bill in equity. Courts of equity have a like general supervision over their process, and more especially over the particular sales ordered by their decrees and made by their special agents or commissioners. So far is this carried under the English practice that the sale, until confirmation by the Chancellor, is treated merely as a bid, and subject to a proposition of advance. 6 Vesey, 513; 8 Ibid. 214. We have not adopted the rule to this extent (15 Ill. 447,) but the power, right, and duty of the court to supervise, protect, and preserve the parties from all fraud, unfairness, and imposition, is of universal application here. *Ayers v. Baumgarten*, 15 Ill. 447; 2 Paige, 99, 339; 3 Ibid. 97; 9 Ibid. 259; 1 Edw. Ch. 577; 5 Humph. 355; 4 Ibid. 372; 2 B. Monroe, 497; 3 Dana, 620; 1 Smede & Marsh Ch. 522; 23 Miss. 445. And this is well put in *Casamajor v. Strode* 1 Sim. & Stu. 381, (1 Eng. Ch. 382,) upon the ground that the purchaser does, by the act of purchase under a decree, submit himself to the jurisdiction of the court as to all matters connected with that character. This is sometimes done by bill, as in *Bacon v. Conn*, 1 Smede & Marsh, Ch. 348; by petition, as in *Henderson v. Harrodetal*, 23 Miss. 451; 2 Paige, 100; 9 Ibid. 260; 3 Ibid. 94; 15 Ill. 144; and sometimes by motion, 2 Dana, 615; 2 B. Monroe, 408; 5 Humph. 355; 2 Paige, 340; 1 Edw. Ch. 578; 4 Ibid. 703. The case before us is a proper one for a motion. The sale by plaintiff to the witness Reynolds, before the bidding, does not present the case of an innocent purchaser who is entitled to be made a party by bill or petition, but is a part of the evidence of the fraudulent conduct of plaintiff in forestalling competition. Decree (setting aside sale) affirmed. Though the English practice of opening the biddings for reception of a higher bid, when offered, does not prevail in Illinois, yet it is by no means unusual in the courts of some others of the States. *Childress v. Hurt*, 2 Swan, 487; *Hay's Appeal*, 51 Penn. St. 58; *Wright v. Cantzon*, 31 Miss. 514."

¹ *Lefevre v. Laraway*, 22 Barb. 167; 2 Story, Eq. Jur. Secs. 1337, 1353, et seq.

² *Deaderick v. Smith*, 6 Humph. 138; *Stephens v. Magruder*, 31 Md. 168; *Hay's Appeal*, 51 Penn. St. 58; *King v. Platt*, 37 N. Y. 155.

³ 6 Humph. 146.

the following language as to the power of courts over their own judgments, decrees, and sales: "Every court must have an inherent power of enforcing its judgments and decrees; and surely to no tribunal can this power more properly belong than to the chancery court. It has under its control all the sales made by its order until final disposition is made of the cause. It can set aside the sale altogether, or open the biddings, or make any other order that may be necessary for the enforcement of the decree." The court add that the purchaser is a party to the proceedings; must have a final order to make his purchase effectual, and is under the control of the court for enforcement of the purchase against him.

§ 546. But sales of real estate in probate, procured by an administrator, will not be set aside at his instance. If right, they should stand; and if wrong, then he is estopped to deny the validity of his own wrongful act.¹ Such, too, is the law as to the estoppel, although the administration is granted anew, but to the same person. The estoppel operates on the person and not on the official trust.²

§ 547. Nor can a judicial sale be set aside, nor the order or decree on which it is made, upon a mere motion filed after the term at which the decree is made, when such motion is predicated on matter which goes to the merits of the decree itself.³ The integrity of the judgment can not thus be brought in question.⁴ To review that otherwise than on an appeal requires an original proceeding.

§ 548. The grounds on which sales are usually sought to be set aside are, inadequacy of price, irregularity, mistake or misapprehension, surprise, frauds, and on account of reversal of the decree of sale. These will be considered in their order.

II. FOR INADEQUACY OF PRICE.

§ 549. If there be no fact or circumstance relied on to set a sale aside but inadequacy of price, then the inadequacy must be

¹ *Snedicor v. Mobley*, 47 Ala. 517; *Pistole v. Street*, 5 Porter, 64; *Fambro v. Gantt*, 12 Ala. 298.

² *Snedicor v. Mobley*, *supra*.

³ *Hartshorn v. Mil. & St. Paul R. R. Co.*, 23 Wis. 692; *Edwards v. City of Janesville*, 14 Wis. 26.

⁴ *Supra*.

such as in itself to raise the presumption of fraud, or else the sale will not be disturbed.¹

But if in addition to such inadequacy there be any appearance of unfairness, or any circumstance, accident, or occurrence in relation to the sale of a character tending to cause such inadequacy, then the sale will be set aside;² but inadequacy of price is still the main ground of disturbing the sale,³ for if the price were full value, or even a passable one, then the objectionable facts or circumstances could have worked no evil.

In the leading case here cited under this head, Judge McLEAN holds the following language on the subject of setting aside judicial sales for mere inadequacy of price: "There does not appear to be, in the present case, any irregularity, mistake, or fraud. The only objection urged is, that the property sold for less than its value. We can not say that this inadequacy is so striking as to authorize the setting aside of the sale."⁴

In the case of *Littell v. Zuntz*,⁵ the Supreme Court of Alabama hold the following language on the same subject: "We are, therefore, of opinion that when a stranger is the purchaser at a mortgage sale, it will not be set aside for mere inadequacy of price, no matter how gross, unless there is some unfair practice at the sale, or unless those interested are surprised without fault or negligence on their part; and in no case of this description after a confirmation, unless fraud can be imputed to the purchaser which was unknown to those interested at the time of confirmation of the sale."

§ 550. It may be accepted as a general rule, that when the cause alleged is fraud, the application to set aside, if after con-

¹ *West v. Davis*, 4 McLean, 241; *Cohen v. Wagner*, 6 Gill, 236; *Ashbee v. Cowell*, Busbee, Eq. R. 158; *Lefevre v. Laraway*, 22 Barb. 167; *Strong v. Catton*, 1 Wis. 471; *Hart v. Bleight*, 3 T. B. Mon. 273; *Reed v. Brooks*, 3 Litt. 127; *Littell v. Zuntz*, 2 Ala. 256; *Gist v. Frazier*, 2 Litt. 118; *Am. Ins. Co. v. Oakley*, 9 Paige, 259; *Bank of Alexandria v. Taylor*, 5 Cranch, C. C. 314; *Fergus v. Woodworth*, 44 Ill. 374; *Tripp v. Cook*, 26 Wend. 142; *Hardy v. Heard*, 15 Ark. 189; *Ayers v. Baumgarten*, 15 Ill. 444; *Heberer v. Heberer*, 67 Ill. 253. And especially so where redemption is allowed. *Dickerman v. Burgess*, 20 Ill. 266; *Dutcher v. Leake*, 44 Ill. 398.

² *Cohen v. Wagner*, 6 Gill, 236; *Gist v. Frazier*, 2 Litt. 118; *May v. May*, 11 Paige, 201; *Bank of Alexandria v. Taylor*, 5 Cranch, C. C. 314.

³ *Cohen v. Wagner*, 6 Gill, 236.

⁴ *West v. Davis*, 4 McLean, 241, 242. See also *Tripp v. Cook*, 26 Wend. 142.

⁵ 2 Ala. 260, 261; *Am. Ins. Co. v. Oakley*, 9 Paige, 259; *Kain v. Masterton*, 16 N. Y. 174.

firmation, must satisfy the court that the fraud was unknown to those complaining at the time of confirmation.

§ 551. The prevalence, at the time of sale, of an infectious disease, to such extent as to remove many people, suspend business and prevent the ordinary probability of a reasonable competition at the sale, will, in connection with inadequacy of price, be cause for setting the sale aside and for ordering a resale.¹

§ 552. So, in Maryland, the ruling is, that inadequacy of price alone will not prevent the confirmation of a judicial sale; there must be some other circumstance, unless the inadequacy be so great as to raise the presumption of fraud.² And so in New Jersey.³ Nor for reason of defendant's non-residence, and that the proceedings were in attachment, if legal, or want of *personal* notice therein; nor for an alleged just defense, the proceedings having been legal and fair.⁴

§ 553. But the making of a judicial sale upon election day, for an inadequate price, in a place where an election is going on, and which is calculated to divert or attract the attention of the people from the subject of the sale, and especially when such sale is made against the written objection of the owner of the property, and against his request that it be postponed to a different day, are, when taken in connection with a total disregard of the owner's wishes, fully made known as to the order in which the different parcels of land should be sold, quite sufficient to induce the court to set aside the sale. The law will shield the unfortunate debtor from every undue advantage over him, even though obtained by pursuing the strict forms of "the law itself", and that, too, by its positive rules.⁵

§ 554. So, if in addition to inadequacy of price there be irregularities coupled with the sale of lands, and the owner, without fault, was ignorant of the sale being made, then equity may set a judicial sale aside, although the sale is made subject to redemption, and the time for redemption has expired.⁶ But a bill for

¹ Littell *v.* Zuntz, 2 Ala. 256.

² Johnson *v.* Dorsey, 7 Gill, 287; House *v.* Walker, 4 Md. Ch. Decs. 62; Warfield *v.* Ross, 38 Md. 85; Horsey *v.* Hough, 88 Md. 130.

³ Eberhart *v.* Gilchrist, 3 Stockton, Ch. 167.

⁴ Cummins *v.* Little, 16 N. J. Eq. 48. But if the price be so inadequate as to shock the conscience, then for that alone it will be set aside. Ibid.

⁵ King *v.* Platt, 37 N. Y. 155.

⁶ Thomas *v.* Hebenstreit, 68 Ill. 115.

such purpose will not be sustained after confirmation of the sale and transfer of the land to a *bona fide* purchaser.¹

Nor will the trivial irregularity of selling on the wrong day, as on the 18th instead of on the 19th of the month, the latter being the day fixed in the decree, avoid the sale or cause it to be set aside, where it is otherwise fair, and was made on due notice, and for a fair price.²

III. FOR IRREGULARITY.

§ 555. A judicial sale is made under the order or decree of the court, and by virtue thereof. The person conducting it should be clothed with a copy of the order or decree, duly authenticated, designating the land to be sold. Though sales otherwise properly made will not be adjudged void for reason of such order not having issued, if such sales are made in conformity to the record of the order;³ yet if the order or decree be to sell on receiving the order, then a sale on receipt of an informal order, which omits the description of the land, and was not directed to any one, though not actually void, will be set aside for irregularity on proper application.⁴

§ 556. Insufficiency of description and inadequacy of price combined, will be cause for setting a sale aside.⁵

So for irregularity, in being made after an appeal is taken and appeal bond filed.⁶

Likewise for any misunderstanding resulting in inadequacy of price.⁷

So, also, if made by a different master than the one mentioned in the decree.⁸

So a mortgage sale will be set aside on bill of review if the mortgagor die during suit, and the heirs be not made parties, and there also be junior mortgagees who were not parties.⁹

And a sale made at an improper time, or under any other cir-

¹ Conover v. Musgrave, 68 Ill. 58.

² Ibid.

³ Rhonemus v. Corwin, 9 Ohio St. 366; Ins. Co. v. Hallock, 6 Wall. 556.

⁴ Rhonemus v. Corwin, *supra*.

⁵ Kauffman v. Walker, 9 Md. 229.

⁶ Chesapeake Bank v. McClelland, 1 Md. Ch. Decs. 328.

⁷ Latrobe v. Herbert, 3 Md. Ch. Decs. 375.

⁸ Yates v. Woodruff, 4 Edw. Ch. 700.

⁹ Shriveley v. Jones, 6 B. Mon. 274.

cumstances that tend to render it inequitable, will be set aside to protect the rights of parties not in fault.¹

Likewise a mortgage sale for a price greatly inadequate and much less than the mortgage debt, will be set aside if made without the knowledge of the creditor.²

A sale made on a different day than the one stated in the notice of sale is void, and should be set aside.³

So, if the property be purchased by the person conducting the sale, if so purchased without leave of the court, it is such an irregularity, aside from the question of fraud, as will cause the sale to be set aside.⁴

In *Michoud v. Girod*, the Supreme Court of the United States review the whole subject of purchases by trustees and others at their own sales, and hold such to be in all cases void.⁵

§ 557. Under the statute in Illinois, if the petition of the guardian for sale of the ward's lands fail to state the ward's residence, and to make a proper case for decree, a sale made in proceedings thereon will, for such irregularity, be set aside.⁶

So, if, for reasons not his fault, a mortgagor fail to attend the sale, and the mortgagee buy in the land at a greatly inadequate price, the sale will be set aside,⁷ but not for inadequacy alone.⁸

§ 558. For any negligence or mistake of the officer selling resulting in an injury to the parties in interest, the sale will be set aside.⁹

· § 559. A sale made on application of the administrator alone, where the law required the heirs or others to join in such application, is irregular, and will be set aside; and if allowed to remain it is void.¹⁰

¹ *Brown v. Frost*, 10 Paige, 243; *Collier v. Whipple*, 13 Wend. 224; *King v. Platt*, 37 N. Y. 155.

² *May v. May*, 11 Paige, 201.

³ *Miller v. Hull*, 4 Denio, 104.

⁴ *Blood v. Hayman*, 13 Met. 231; *Mann v. McDonald*, 10 Humph. 275; *Hoskins v. Wilson*, 4 Dev. and B. 243; *Scott v. Freeland*, 7 S. and M. 409; *Worthy v. Johnson*, 8 Geo. 236; *Shaw v. Swift*, 1 Ind. 565; *Michoud v. Girod*, 4 How. 503, 553.

⁵ 4 How. 503.

⁶ *Lloyd v. Malone*, 23 Ill. 43, 47.

⁷ *Tripp v. Cook*, 26 Wend. 143.

⁸ *Ibid.*; *Cohen v. Wagner*, 6 Gill, 236; *West v. Davis*, 4 McLean, 241, 242.

⁹ *Am. Ins. Co. v. Oakley*, 9 Paige, 259; *King v. Platt*, 37 N. Y. 155.

¹⁰ *Miller v. Miller*, 10 Texas, 319.

§ 560. And a sale of land a second time by the same administrator will be set aside at the personal cost of such administrator.¹

§ 561. So a sale of lands on a mortgage decree, when the mortgage of a minor's lands was made by his guardian, will be set aside if a full defense be not made by the guardian to test the validity of the mortgage.²

§ 562. And if the proceeding is designed to obtain the sale of two tracts of land, and the decree of sale, instead of describing the lands ordered to be sold, direct the sale of "the tract of land described in the petition," and give no other description by which to identify the lands to be sold, and a sale be made on such decree, it will be set aside. The court should specify the land to be sold, and leave nothing for the decision of the officer or commissioner selling.³

§ 563. Where land is sold together, instead of in parcels, all else being sufficient, the sale is not void, but merely *voidable* within a reasonable time, in the sound discretion of the court, and for a direct application to set it aside, but can not, for such cause, be impeached collaterally.⁴

§ 564. Applications for setting aside judicial sales for merely *voidable* causes must be made in seasonable time and diligence, and especially before the intervening (if the cause relied on be known) of other interests.⁵

§ 565. But a sale will not ordinarily be set aside after confirmation and distribution of the proceeds.⁶

IV. FOR MISTAKE AND MISAPPREHENSION.

§ 566. A sale will be set aside for misapprehension caused by a purchaser or others interested in the sale, or by the person conducting it.⁷ So, likewise, if the auctioneer, not hearing a

¹ Hurt *v.* Horton, 12 Texas, 285.

² Curtis *v.* Ballagh, 4 Edw. Ch. 635.

³ Lawless *v.* Barger, 9 Bush, 665.

⁴ Osman *v.* Traphagen, 23 Mich. 80, 85.

⁵ Goodwin *v.* Burns, 21 Mich. 211; Bullard *v.* Green, 10 Mich. 268.

⁶ Stiver's Appeal, 56 Penn. St. 9.

⁷ Laight *v.* Pell, 1 Edw. Ch. 577, 578; Lefevre *v.* Laraway, 22 Barb. 167; Anderson *v.* Foulke, 2 Har. & G. 346; Strong *v.* Catton, 1 Wis. 471; Gordon *v.* Saunders, 2 McCord, Ch. 151; Brown *v.* Gilmore, 8 Md. 322; Veeder *v.* Fonda, 3 Paige, 94, 97; First National Bank of Mt. P. *v.* Conger, 37 Iowa. 474.

higher bid, strike off the property to a lower bidder.¹ So if the property of infants be sacrificed by the neglect, fraud or misapprehension of their guardian, they will be relieved by setting aside the sale and by a resale.² The order of resale may be made on the court's own motion, as guardian of all infants.³

§ 567. A creditor purchasing at a judicial sale, under the mistaken supposition that he has a right to apply the amount of his own debt, in payment so far as it will go upon his bid, and to account over for only the balance of the purchase money, must ask for relief by setting aside the sale on the ground of surprise or mistake, so as to place the parties in the condition they were in before the sale, otherwise he will be liable for the whole amount of his bid.⁴ And if in the meantime he has disposed of the property in good faith before discovery of the mistake or being called on to respond, equity requires that he should show a readiness and offer to pay over the proceeds of the sale so made by him. He can not sell and retain the proceeds, and at the same time enforce a release by setting aside the sale. Seeking equity he must do equity.⁵

V. FOR SURPRISE.

§ 568. Sales of real estate under orders and decrees will be set aside for surprise when an injury or an unfair advantage result therefrom; as if a complainant in a decree give such assurances of postponement or delay of sale, (though not with intent to deceive) as induces the debtor without other negligence on his part to omit raising means for the present to meet the debt, and a sale be made for a price greatly inadequate, it will be set aside for surprise and a resale will be ordered.⁶ But not after long or unreasonable delay in making the application, and when other parties have acquired an interest in the property under the sale.⁷

§ 569. But a sale ought not to be set aside and a resale

¹ Gordon *v.* Saunders, 2 McCord, Ch. 159; Cohen *v.* Wagner, 6 Gill, 236.

² Lefevre *v.* Laraway, 22 Barb. 167; Curtis *v.* Ballagh, 4 Edw. Ch. 635.

³ Lefevre *v.* Laraway, *supra*.

⁴ First National Bank of Mt. P. *v.* Conger, 37 Iowa, 474.

⁵ *Ibid.*

⁶ Strong *v.* Catton, 1 Wis. 471; Williamson *v.* Dale, 3 Johns. Ch. 291; Griffith *v.* Hadley, 10 Bosw. 587; Demeray *v.* Little, 19 Mich. 244.

⁷ Leonard *v.* Taylor, 12 Mich. 398.

ordered for the benefit of those interested in the fund arising from the sale merely to protect them, they being adults, from the consequences of their own negligence or ignorance, when by proper diligence on their part the matter complained of might have been avoided.¹

VI. FOR FRAUD.

§ 570. It is a principle well settled in law that fraud vitiates all instruments and proceedings, including judgments, orders and decrees, and sales made thereon, or by virtue thereof.²

§ 571. If not absolutely void, they will be avoided or set aside at the instance of the injured party, if application be made within proper time.³

§ 572. Sales, as well judicial as others, will be set aside by the courts where fraud is made to appear, (and in some cases) even after confirmation thereof.⁴

§ 573. If the person conducting a judicial sale purchase at his own sale, it is a fraud for which the sale will be set aside on motion to the same court in which the sale is ordered, if application be made before confirmation; and if after confirmation, then the proceeding to set the sale aside is by petition or bill in chancery.

§ 574. The rule is the same if the person selling procure the purchase for himself or for his benefit through a third party. And though some authorities treat such sales as only voidable, by others they are held to be absolutely void. The latter is the ruling in the Supreme Court of the United States.⁵

§ 575. A purchase by the attorney of the execution plaintiff at a price greatly inadequate will be cause for the most vigilant

¹ Am. Ins. Co. *v.* Oakley, 9 Paige, 258, 260, 261.

² Hoitt *v.* Holcomb, 23 N. H. 535, 554; Michoud *v.* Girod, 4 How. 503; Able *v.* Chandler, 12 Tex. 88.

³ Michoud *v.* Girod, 4 How. 503; Concord Bank *v.* Gregg, 14 N. H. 331; Davoue *v.* Fanning, 2 Johns. Ch. 252; Lloyd *v.* Malone, 23 Ill. 43; Neal *v.* Stone, 20 Mo. 294; Able *v.* Chandler, 12 Tex. 88.

⁴ Anderson *v.* Foulke, 2 Har. & G. 346, 357; Billington *v.* Forbs, 10 Paige, 487; King *v.* Platt, 37 N. Y. 155; Garrett *v.* Moss, 20 Ill. 549; Johnson *v.* Johnson, 40 Ala. 247; May *v.* May, 11 Paige, 201.

⁵ Michoud *v.* Girod, 4 How. 503; Davoue *v.* Fanning, 2 Johns. Ch. 253; Wormley *v.* Wormley, 8 Wheat. 421; Miles *v.* Wheeler, 43 Ill. 123; Harris *v.* Parker, 41 Ala. 604; Booraem *v.* Wells, 4 Green, (N. J.) 87; Swayze *v.* Burke, 12 Pet.

scrutiny into every circumstance which might affect the fairness or demonstrate the unfairness of the sale. Even the purchase by the attorney alone (without such inadequacy,) has been considered good cause for setting aside the sale, as being against "the policy of justice."¹ In *Busey v. Hardin*,² the court say: (referring to *Howell v. McCreery*, 7 Dana, 389 and 390, and to *Foreman v. Hunt*, 3 Ibid., 622,) "It is said that a sale at which the attorney purchases at a grossly inadequate price should be considered as *per se*, in the twilight between legal fraud and fairness, and that slight additional facts exhibiting a semblance of unfairness would be sufficient to vitiate the sale or make the purchaser a trustee." The court adds: "If there be any ground for such a distinction as we think there is, it rests upon the superior knowledge of the right, and of the subject of sale which the attorney has, by reason of his connection with the suit, and upon the presumed influence which he has over the time and manner of the sale, and over the person who makes it, by reason of his representing the party for whose interest, primarily, the sale is to be made."

VII. ON ACCOUNT OF REVERSAL OF THE DECREE OF SALE.

§ 576. Where the sale is to a third person and *bona fide* purchaser, and has been fully completed by confirmation, conveyance and payment, it will neither be avoided nor will it be set aside by reason of a subsequent reversal of the decree. This rule is so generally recognized as to scarcely require authorities to support it. In the language of the Illinois Supreme Court, "If the court has jurisdiction to render the judgment or to pronounce the decree, that is, if it has jurisdiction over the parties and the subject matter, then upon principles of universal law, acts performed and rights acquired by third persons, under the authority of the judgment or decree, and while it remains in force, must be sustained, notwithstanding a subsequent reversal."³

¹ *Busey v. Hardin*, 2 B. Mon. 407.

² *Ibid.* 409, 410.

³ *Goudy v. Hall*, 36 Ill. 319. See also *McLagan v. Brown*, 11 Ill. 523; *Young v. Loraine*, 11 Ill. 637; *Iverson v. Loberg*, 26 Ill. 179; *Fitz Gibbon v. Lake*, 29 Ill. 165; *McJilton v. Love*, 13 Ill. 486; *Peak v. Shasted*, 21 Ill. 137; *Grignon's Lessee v. Astor*, 2 How. 340; *McBride v. Longworth*, 14 Ohio St. 350; *Irwin v. Jeffers*, 3 Ohio St. 389; *Hobson v. Ewan*, 62 Ill. 146; *Hastings v. Johnson*, 1 Nev. 613.

§ 577. And, in Ohio, on reversal of the decree under which the sale was made, the purchaser is protected although he be one of the parties or creditors for whose benefit and on whose application the sale is made, where there are several creditors for whose benefit it is made, and all presenting in the same suit and jointly obtaining the decree of sale, and to all of whom some portion of the proceeds of the sale are distributed.¹ Such purchase is protected in equity by analogy to the doctrine declared by statute in said State as to execution sales, that though judgment be reversed, such reversal shall not defeat the title under the sale; but that the judgment creditor shall respond to the defendant for the money so realized from the sale.² The leading case here cited is distinguishable from *Hubbell v. Broadwell*, 8 Ohio, 120, in which there was one person only obtaining the decree and participating in the proceeds.³

VIII. RESALE.

§ 578. A resale will ordinarily be ordered when the sale is set aside for fraud, irregularity, mistake, surprise, inadequacy of price, or for such other cause as does not involve a want of jurisdiction or power in the courts to sell, if the sale is set aside before confirmation.⁴

§ 579. And in some cases the first purchaser, being in fault, will be held responsible for the discrepancy in amount between the first and second sale, if the second sale be for a less sum than the first.⁵

§ 580. In Maryland, under the Code, if the sale be partly on a credit and the purchaser fail to meet the deferred payments when due, then on application of the master or other person conducting the sale, the sale may be set aside and a resale ordered at the risk of the first purchaser; or the court, under its equity powers, (if of general chancery jurisdiction,) may compel

¹ *McBride v. Longworth*, 14 Ohio St. 349, 350.

² *Supra*.

³ *Supra*.

⁴ *Stephens v. Magruder*, 31 Md. 168; *Deaderick v. Smith*, 6 Humph. 138; *King v. Platt*, 37 N. Y. 155; *Hay's Appeal*, 51 Penn. St. 58; *Lefevre v. Laraway*, 22 Barb. 167; *Am. Ins. Co. v. Oakley*, 9 Paige, 259; *Post v. Leet*, 8 Paige, 387; *Brown v. Frost*, 10 Paige, 243; *Coffey v. Coffey*, 16 Ill. 141; *Roberts v. Roberts*, 13 Gratt. 639.

⁵ *Mullikin v. Mullikin*, 1 Bland, 538, 541; *Stephens v. Magruder*, 31 Md. 168.

a compliance or specific performance on the part of the purchaser, at its discretion, in view of all the circumstances of the case and as may best subserve, in its opinion, the interests and rights of the parties.¹ Such, however, is the general law aside from statute.

§ 581. The making of a judicial sale, in New York, is under control of the court, and if the parties in interest, creditor and debtor, can not agree as to the order in which property shall be offered for sale, either party may apply to the court for instructions to the referee in that respect.²

§ 582. When valuable property is sold by the referee in a different order from that requested by the debtor, whose property is being sold, and there is reason to believe that selling in the order requested by the debtor would have resulted in a benefit, and there are circumstances tending to prevent competition at the sale, a resale will be ordered.

§ 583. And so where the inclemency of the weather was such as to prevent the attendance of bidders, the purchaser being the only one present and she residing at the place of sale, it was held that the sale should be set aside, and a resale was ordered.³

§ 584. If it become apparent to the court, from the face of the proceedings or otherwise, that the rights of minors have been illegally invaded or compromised, the court will, on its own motion, set aside or decline to confirm the sale, and will order a resale of the property without waiting to be invoked so to do. It is in such case the duty of the court, in the exercise of its high powers as guardian of all minors, to protect the interests of those whom equity makes the special objects of its care;⁴ and the purchase of the property by the guardian *ad litem* of an infant owner is a case loudly calling for such interference.⁵

§ 585. The biddings may be opened and a resale ordered, at the discretion of the court, on terms, at any time before the con-

¹ Stephens *v.* Magruder, 31 Md. 168.

² King *v.* Platt, 37 N. Y. 155. In this case the court justly say that, "Occupying the position of advantage it behooved the plaintiffs to pursue their remedy with scrupulous care, lest they should inflict an injury on one who was comparatively powerless." See also to this point Collier *v.* Whipple, 13 Wend. 229.

³ Roberts *v.* Roberts, 13 Gratt. 639

⁴ Lefevre *v.* Laraway, 22 Barb. 167; Lansing *v.* McPherson, 3 Johns. Ch. 424; Billington *v.* Forbs, 10 Paige, 487.

⁵ Lefevre *v.* Laraway, *supra*.

firmation of the sale, in case there be an acceptable advance offered on a greatly inadequate price.¹

§ 586. The petition to reopen the bidding should state the proposed amount of the advance upon the former bid.²

§ 587. Before confirmation an offer of ten *per cent.* and costs of increase is sometimes deemed sufficient to cause an order of resale to be made.³

§ 588. And so, in Virginia, the ruling is that the biddings will be opened in a judicial sale and a resale ordered for a material advance, where the sale is at a sacrifice.⁴ But not for an advance of one hundred dollars on a bid of five hundred.⁵

Nor is it an objection, if the terms of the decree are observed in selling, and the sale is fair, that there were but few bidders present.⁶ But where the sale was at a sacrifice and one of the commissioners conducting the sale was concerned in the purchase, the sale was set aside.⁷

§ 589. When the party buying declines to make good his bid, the court may cause the property to be resold, at the risk of the former bidder; but it is held in some States that this being a harsh proceeding, the more reasonable ruling would seem to be, that before proceeding to resell, a deed of conveyance of the property should be tendered to the purchaser, with a demand of payment of the purchase money.⁸ On this subject, however, there is some conflict of the authorities. The ruling in some of the States is, that the purchase money must be first paid, the sale being for cash, and that the delivery of the deed is to follow, so that it is not necessary to tender the purchaser a deed in order to place him in default.⁹ In others it is held that the acts are

¹ Childress *v.* Hurt, 2 Swan, 487; Hay's Appeal, 51 Penn. St. 58; Wright *v.* Cantzon, 31 Miss. 514, 517.

² Wright *v.* Cantzon, 31 Miss. 514, 517.

³ Horton *v.* Horton, 2 Brad. (N. Y.) 200.

⁴ Teel *v.* Yancey, 23 Gratt. 691.

⁵ Hudgins *v.* Lanier, 23 Gratt. 494.

⁶ Ibid.

⁷ Teel *v.* Yancey, *supra*.

⁸ Jennings *v.* Hodges, 16 La. Ann. 321; Municipality *v.* Hennen, 14 La. 559; Hodge *v.* Moore, 3 Rob. (La.) 401; Petit *v.* Laville, 5 Rob. (La.) 117; Guillotte *v.* Jennings, 4 La. Ann. 242; Miltenberger *v.* Hill, 17 La. Ann. 52.

⁹ Negley *v.* Stewart, 10 Serg. & R. 207.

concurrent, and that the payment of the purchase money and delivery of the deed are acts to be performed at one and the same time.³

³ *The State v. Lines*, 4 Ind. 351; *Hunt v. Gregg*, 8 Blackf. 105; *Williams v. Lines*, 7 Blackf. 46; *Catlin v. Jackson*, 8 John. 520.

PART II.

CHAPTER XIV.

THE NATURE OF EXECUTION SALES.

- I. THEY ARE MINISTERIAL SALES.
- II. THE OFFICER SELLING IS, IN LAW, THE ATTORNEY OF THE EXECUTION DEBTOR.
- III. THERE IS NO WARRANTY. THE RULE *Caveat Emptor* APPLIES.
- IV. THEY ARE WITHIN THE STATUTE OF FRAUDS.
- V. EFFECT OF SUBSEQUENT REVERSAL OF JUDGMENTS, OR QUASHING THE EXECUTION.

I. THEY ARE MINISTERIAL SALES.

§ 590. In making ordinary execution sales, simply by virtue of his office, the sheriff or marshal acts as the ministerial officer of the law — not as the organ of the court. He is not its instrument or agent, as in judicial sales, and the court is not the vendor. His authority to sell rests on the law and on the writ, and does not, as in judicial sales, emanate from the court. The functions of the court terminate at the rendition of the judgment, except where confirmation of the sale is the practice. The court does not direct what shall be levied or sold, or how the sale shall be made. The law is the officer's only guide.¹

This very principle was distinctly avowed by the Supreme Court of the United States, DANIEL, Justice, in *Griffin v. Thompson*,² in reference to which that court characterize the marshal's functions in enforcing an execution at law in the following terms: He is the "officer of the law, and is bound to fulfill the behests of the law; and this too, without special instruction or admonition from any person." Unlike a master or commissioner, selling on decree in chancery, the law is his guide; while the master or commissioner are subject to the guidance and the order of the court. In the language of the learned Justice, REDFIELD, "it is

¹ Bac. Abt. Sheriff, (M.); *Foreman v. Hunt*, 3 Dana, 614, 621; Gantly's *Lessee v. Ewing*, 3 How. 714; *Todd v. Philhower*, 4 Zabr. 796; *McKnight v. Gordon*, 13 Rich. Eq. 222; *South v. Maryland*, 18 How. 396, 402; *Amis v. Smith*, 16 Pet. 309, 313; *Griffin v. Thompson*, 2 How. 256, 257.

² 2 How. 256, 257.

plain then that a sheriff's sale is not a judicial sale. If it were, an action could be brought against the sheriff for selling upon execution property not belonging to the debtor."¹

§ 591. There are exceptions to this rule, some of which may be stated. When, by the law, the sale is required to be reported to the court for confirmation, and is only binding when confirmed by the court, in such cases sheriff's sales, on ordinary execution, partake of the nature of *judicial* sales; for the act of confirmation is a *judicial* act, and is spread upon the records. This distinction, to-wit, the necessity of confirmation, is the line drawn by Justices STORY and BALDWIN, on the circuit, and GRIER delivering the opinion of the Supreme Court of the United States, as contra-distinguishing *judicial* from *execution* sales.²

§ 592. Another exception to the rule first above stated is, in mixed cases of law and equity, in which special executions issue under the statute, partly partaking of the nature of an execution at law and of an order of sale in chancery. Here the precise character of the sale depends upon the special features of each case. It may be *judicial*, and it may be *ministerial*, as either feature predominates; and it may partake of the qualities of each in some respects.

§ 593. In attachments, simply the proceedings being *in rem*, the property only, if any is found on which to levy the writ of attachment, is affected thereby. The judgment is likewise *in rem*, and condemns the specific property levied on in the attachment, to be sold on special execution. No other property can be affected.³

Neither in such case can any personal judgment be rendered against the defendant while the proceeding thus remains exclusively *in rem*. The service being by *publication*, the defendant is not subject to personal judgment, for the reason that he is not personally in court.⁴

§ 594. But if he enter his appearance to the proceedings, and such appearance is shown by the record, the judgment may then be a personal one, on which other process than that resulting from the attachment levy may issue, after the attached property is

¹ Griffith v. Fowler, 18 Vt. 394.

² Thompson v. Phillips, 1 Bald. C. C. 264; Smith v. Arnold, 5 Mas. C. C. 414, 420, 421; Griffith v. Bogert, 18 How. 158.

³ Maxwell v. Stewart, 22 Wall. 77.

⁴ Ibid.

exhausted, or an action may be maintained upon the personal judgment, as on personal judgments in ordinary cases.¹ For the levy, or seizure of the property, on the writ of attachment, does not *per se*, nor necessarily, as a final result, work a satisfaction of the judgment subsequently recovered in that particular action; the levy is a mere security; the officer holds the property as a security, and is responsible for the same to the extent of any ordinary case. If, by sale, the money is made thereon to satisfy the judgment and costs, or to a lesser amount, it is applied in satisfaction of the whole, or *pro tanto*, depending upon the amount realized. And so, if the property be lost by the negligence of the officer, the value thereof, when made of him, is to be applied on the judgment,² if not in the meantime otherwise satisfied.

If neither by the one or the other of these means the judgment is satisfied, then a personal action lies against the defendant upon the judgment for so much thereof as remains unpaid.

§ 595. In ordinary execution sales, the court neither order the execution nor the sale. There are, however, special instances when ordinary writs of execution are ordered by the court, as when there is satisfaction wrongfully entered of a judgment, or returned of an execution, satisfaction will be set aside and an alias writ of execution will be ordered; but when issued, it is none the less a mere ordinary execution, and on it the sheriff sells under the power of the law.

§ 596. The exercise of this power, however, is invoked by the writ of execution. The act of selling is ministerial.³ The officer selling is for that purpose constituted by law the agent and attorney of the execution defendant;⁴ and is not, as in judicial sales, the agent or instrument of the court.⁵

§ 597. The title under sheriff sale passes to the purchasers, as a general rule, without the express sanction or confirmation of the court,⁶ which possesses only the negative power of setting

¹ Maxwell *v.* Stewart, 22 Wall. 77.

² Ibid.

³ Bac. Abt. Title Sheriff, (M.); Todd. *v.* Philhower, 4 Zabr. 796.

⁴ Cooper's Lessee *v.* Galbraith, 3 Wash. C. C. 546, 550; Shortzell *v.* Martin, 16 Iowa, 519.

⁵ Forman *v.* Hunt, 3 Dana, 622; McKnight *v.* Gordon, 13 Rich. Eq. 222.

⁶ Forman *v.* Hunt, *supra*.

aside the sale for cause. To this, however, there are exceptions in several of the states, where, by law, confirmation is required.¹

§ 598. In the latter class of cases the sale, by the judicial act of confirmation, becomes in some respects a judicial sale, and as such is characterized by Justice BALDWIN, in *Thompson v. Phillips*, a case which arose under the laws of Pennsylvania, and where, as in other Pennsylvania cases, the practice is to confirm in open court at the time of the acknowledgment of the deed. In that case the court say: "In this State, the reception of an acknowledgment of a sheriff's deed is a judicial act, in the nature of a judgment of confirmation of all the acts preceding the sale, curing all defects in the process or its execution, which the court has power to act upon."² When the acknowledgment is thus taken, and the deed or sale confirmed, then, in contemplation of law, everything which has been done is considered as done by the order or under the sanction of the court.³

II. THE OFFICER SELLING IS, IN LAW, THE ATTORNEY OF THE EXECUTION DEBTOR.

§ 599. The sheriff or other officer making the sale is empowered by law to convey by deed to the purchaser, under an execution, all the right, title, interest and estate of the defendant, as fully (but not to warrant) as the defendant himself, or an attorney empowered for that purpose by him, could do. The officer, in fact, acts as such attorney or agent, appointed for that purpose by law.

The purchase money is applied to the use of the defendant in the discharge of his debt; between him and the purchaser the law raises a contract, in like manner as if the conveyance (without warranty) had been made by himself.⁴ We have appropri-

¹ *Curtis v. Norton*, 1 Ohio, 137; *Thompson v. Phillips*, 1 Bald. C. C. 246, 272; *McBain v. McBain*, 15 Ohio St. 337.

² *Thompson v. Phillips*, *supra*; *Smith v. Simpson*, 60 Penn. St. 168; *McBain v. McBain*, *supra*.

³ *Thompson v. Phillips*, 1 Bald. C. C. 272; *Voorhees v. The U. S. Bank*, 10 Pet. 472, 476; *McBain v. McBain*, 15 Ohio St. 337; *Woods v. Lane*, 2 S. and R. 52, 54, 55.

⁴ *Cooper's Lessee v. Galbraith*, 3 Wash. C. C. 546, 550; *Shortzell v. Martin*, 16 Iowa, 519; *Conway v. Nolte*, 11 Mo. 74; *McKnight v. Gordon*, 13 Rich. Eq. 222; *Kilgore v. Peden*, 1 Strob. L. 18; *Stuckey v. Crosswell*, 12 Rich. L. 273, 278.

ated in most of the above the very language of the learned jurist, Justice WASHINGTON.

And the same doctrine is held in South Carolina. In *Massey v. Thompson*,¹ Justice COLCOCK said: "The defendant ought not to be permitted to oppose the title of a purchaser. The sheriff's deed is his. He has received the consideration. It has been applied to the payment of his debts. He should be estopped." The doctrine is reasserted by Justice INGLIS, in *McKnight v. Gordon*.²

§ 600. Though the officer, in *making the deed*, under an execution sale, acts, in contemplation of law as the attorney of the debtor,³ yet, in many other respects, he is, in the execution of the writ, the agent of both plaintiff and defendant, and is bound to protect their interests to the extent of his power, in the discharge of his duties.⁴

§ 601. When a bidder declines to pay the amount of his accepted bid, it is the duty of the officer to resell the property. If at the resale, the full amount of the writ or writs in his hands is realized, with costs, his functions, so far as they concern the raising of proceeds, are exhausted; but if such second sale does not raise the required amount, the officer may, by statute in some States,⁵ recover of the first accepted and defaulting bidder, the amount of the difference between his bid and the sum subsequently realized, and apply the same toward the writ or writs. This we conceive to be the law, irrespective of statute. But if the subsequent sale realizes an amount that satisfies the writs, yet not so much as the amount first bid, then such action for the difference will not lie at the suit of the officer against the defaulting bidder,⁶ for his functions as to raising money are exhausted, but may, under the statute in Missouri, be enforced against him by the execution debtor. If there be junior liens against the same lands, then, instead of the debtor being enti-

¹ 2 Nott & McCord, 105.

² 13 Rich. Eq. 222, 239.

³ Ante, Sec. 599.

⁴ *Strawbridge v. Clark*, 52 Mo. 21, 22; *Shaw v. Potter*, 50 Mo. 281; *Conway v. Nolte*, 11 Mo. 74.

⁵ *Strawbridge v. Clark*, 52 Mo. 21.

⁶ *Reed v. Shepperd*, 38 Mo. 463; *Strawbridge v. Clark*, 51 Mo. 21, 22. In this latter case, (p. 22) ADAMS, J., expresses the opinion that the sheriff may recover the difference in either case; but at the same time recognizes the contrary as the ruling of the Supreme Court of Missouri.

tled to such surplus balance, the lien creditor next in order is entitled to the same, and in such case no action therefor will lie in behalf of the execution debtor.¹

III. THERE IS NO IMPLIED WARRANTY. THE RULE OF *Caveat Emptor* APPLIES.

§ 602. In making a sale under execution the sheriff or other public officer professes to sell only the interest or estate of the judgment debtor in the premises.

He is not bound to convey with a warranty; neither does the law imply one: The rule of *caveat emptor* applies. Let the buyer beware of the title for which he bids.²

The purchaser acquires only the title of the execution defendant as it existed at the date of the judgment, if such judgment is a lien upon the premises sold;³ and if not a lien, then from the date of the levy of the execution;⁴ but if suit is by attachment, then the purchaser takes title from the date of the levy, or as in attachments, delivery of writ,⁵ or as in some of the States from the teste, and in others from the delivery of the writ.⁶

If the officer convey with warranty, he binds himself thereby, personally, and no one else.⁷

§ 603. Purchasers at execution sales can not, when there is no fraud, excuse themselves from paying the amount of the purchase money, nor avoid their bid by showing that the judgment debtor had no title to the property sold, or that his title thereto was defective.

The maxim *caveat emptor* applies in all its strictness. There is no warranty. The officer sells only the title of the debtor.⁸

¹ *Strawbridge v. Clark*, *supra*.

² *Hamsmith v. Espy*, 19 Iowa, 444, 246; *Dean v. Morris*, 4 G. Greene, 312; *Ritter v. Henshaw*, 7 Iowa, 97, 100; *Avent v. Reed*, 2 Stew. (Ala.) 488; *Phillips v. Johnson*, 14 B. Mon. 140; *Harth v. Gibbes*, 3 Rich. L. 316; *Reed's Appeal*, 18 Penn. St. 476; *Rocksell v. Allen*, 3 McLean, 357; *Creps v. Baird*, 3 Ohio St. 277; *Lang v. Waring*, 25 Ala. 625; *Coyne v. Souther*, 61 Penn. St. 455, 457.

³ *Smith v. Allen*, 1 Blackf. 23; *Bac. Abt. Tit. Execution*, 725; *Miller v. Finn*, 1 Neb. 254.

⁴ *Boyd v. Longworth*, 11 Ohio, 235.

⁵ *Shirk v. Wilson*, 13 Ind. 129.

⁶ *McLean v. Upchurch*, 2 Murph. 353; *Lewis v. Smith*, 2 S. & R. 141, 157.

⁷ *Rocksell v. Allen*, 3 McLean, 357; *The Monte Allegre*, 9 Wheat. 616.

⁸ *Cameron v. Logan*, 8 Iowa, 434; *Dean v. Morris*, 4 G. Greene, 312; *Dunn*

And it does not matter if there be no fraud, *caveat emptor* being the maxim applicable to all execution sales, as well as judicial sales, whether the question arises in a proceeding at law or in a suit in chancery, there is no warranty, and the validity of the title, say the Supreme Court of Illinois, in a recent case, is at the purchaser's own risk. The same court, BREESE, J., say: "Can equity relieve in the absence of all fraud in such a case? The maxim there, as at law, is *caveat emptor*. The buyer must look out for himself. The books are full of cases where this maxim has always been applied, and in this court especially." It is, in fact, a principle too well settled everywhere to be any longer open to controversy.¹

§ 604. But though there is ordinarily no warranty in an execution sale, yet the officer selling is bound to act with fairness, and if he impose upon a purchaser by holding out and representing the property as belonging to the debtor, when in fact it does not, and he is cognizant thereof, he will be liable to an action at the suit of the purchaser for the purchase money, if paid, while yet in his hands.² And, we suppose, also liable, if the money is paid over, to an action for fraud and deceit. The case above cited was the sale on execution of a horse belonging to one person for the debt of another person, and the officer was so well advised of the circumstance as to ownership that he refused to sell until he received a bond of indemnity; nevertheless, he thereafter sold, and held out and encouraged the idea to the bidders that the horse belonged to the debtor.

§ 605. Such sales are none the less sheriffs' sales, if the officer,
e. Frazier, 8 Blackf. 432; *Rodgers v. Smith*, 2 Ind. 526; *England v. Clark*, 5 Ill. 486; *Bassett v. Lockard*, 60 Ill. 164; *McManus v. Keith*, 49 Ill. 389; *Owings v. Thompson*, 4 Ill. 502; *Wingo v. Brown*, 14 Rich. L. 103; *Thayer v. The Sheriff*, 2 Bay, 169; *Davis v. Murry*, 2 Mills, (S. C.) 143; (The rule has always prevailed in South Carolina—*Ibid.*) *Howard v. North*, 5 Tex. 290; *Walton v. Reager*, 20 Tex. 103. In North Carolina, the purchaser takes subject to all equities; *Walker v. Moody*, 65 N. C. 599.)

¹ *Holmes v. Shaver*, 78 Ill. 578; *Bassett v. Lockard*, 60 Ill. 164; *Vanscoyoc v. Kimler*, 77 Ill. 151. (The fact that the property purchased is incumbered does not alter the case, if there are no misrepresentations nor fraud. *Ibid.*) *Methvin v. Bexley*, 18 Geo. 551; *Howard v. North*, 5 Tex. 290; *Walton v. Reager*, 20 Tex. 103; *McMannis v. Keith*, 49 Ill. 389; *Owings v. Thompson*, 4 Ill. 502; *Lynch v. Baxter*, 4 Tex. 431; *Poor v. Boyce*, 12 Tex. 440; *Baker v. Coe*, 20 Tex. 429; *Brown v. Christie*, 27 Tex. 73; *Edmondson v. Hart*, 9 Tex. 554; *Williams v. McDonald*, 13 Tex. 322.

² *Bartholomew v. Warner*, 32 Conn. 98.

at the instance of the plaintiff and defendant in execution, sells on a credit; and therefore the collection of a note given for such purchase money can not be evaded by reason of failure of title.¹

IV. THEY ARE WITHIN THE STATUTE OF FRAUDS.

§ 606. Execution sales, in the absence of any memorandum of the officer selling, are considered within the statute of frauds. The case here cited arose in Maryland, where no formal deed is made by the sheriff, but the return of the sheriff constitutes the purchaser's muniment of title. The same rule, however, prevails in reference to the statute of frauds where deeds are executed by the sheriff.

Such sales by the sheriff are made under the law, and not under direction of the court, and not being sales of the court, as are judicial sales strictly such, they are within the statute. But the judicial sale, being a sale in court, the buyer becomes a party to the case, and is in court, and the court will not allow its own proceedings to be repudiated under the statute.²

§ 607. But circumstances may take them out of the statute; and the current of authorities is, that it is sufficient to take an execution sale out of the statute, that the officer selling makes, at the time of sale, a written return on the writ, showing the sale, and files the same in the proper office within the time limited for a return thereof.³

V. EFFECT OF REVERSAL OF JUDGMENT.

§ 608. Sales made under process issued on irregular or erroneous judgments, are not affected by the subsequent reversal of such judgments for mere error or irregularity.⁴ But the con-

¹ Kilgore *v.* Peden, 1 Strob. L. 18.

² 4 Kent Com. 434, 435; Remington *v.* Linthicum, 14 Pet. 84; Hartt *v.* Rector, 13 Mo. 497; Chapman *v.* Harwood, 8 Blackf. 82; Hadden *v.* Johnson, 7 Ind. 394; Barney *v.* Patterson, 6 Har. & J. 182; Ruckle *v.* Barber, 48 Ind. 274; Ennis *v.* Waller, 3 Blackf. 472; Hadden *v.* Johnson, 7 Ind. 394; Curran *v.* Curran, 40 Ind. 473.

³ Hadden *v.* Johnson, 7 Ind. 394; Barney *v.* Patterson, 6 Har. & J. 182; Hansen *v.* Bane's Lessee, 3 Gill. & J. 359; Elfe *v.* Gadsden, 2 Rich. L. 373; Fenwick *v.* Floyd, 1 Har. & J. 172; Nichols *v.* Ridley, 5 Yerg. 63.

⁴ Williams *v.* Cummins, 4 J. J. Mar. 637; Barney *v.* Patterson, 6 Har. & J. 182; Reardon *v.* Searcey, 2 Bibb, 202; Coleman *v.* Trabune, 2 Bibb, 518; Sneed *v.* Reardon, 1 A. K. Mar. 217; Estes *v.* Boothe, 20 Ark. 583; Bank of U. S. *v.*

trary is the settled doctrine, where the reversal is for want of jurisdiction to render judgment. Sales in the latter class of cases are void *ab initio*. There can be no valid sale without a valid writ, and no writ is valid as an execution that is based on a void judgment.¹

§ 609. Against mere irregularities, it is the policy of the law to sustain execution sales as against the judgment debtor.

§ 610. In Indiana, when the execution plaintiff is purchaser at an execution sale, and the judgment is thereafter reversed, the sale is void under the statute.² And so, likewise, if the judgment be reversed only in part; as for costs, when the sale is made for both debt and costs.³

§ 611. In Ohio, under the appraisement law of 1841, sales at law on execution are required to be confirmed by the court. It is there held that when the execution plaintiff is purchaser, and has not conveyed the property away to a *bona fide* purchaser by the reversal of the order of confirmation, the sale becomes a "nullity," and the title is "devested" out of such execution purchaser.⁴

§ 612. It is further held by the Iowa court, in *Twogood v. Franklin*,⁵ that the effect of the reversal is to avoid the sale and defeat the title in the hands of such execution purchaser so buying with notice of appeal, and also the title of his grantee, who takes by purchase, under him, with knowledge, after the reversal of the judgment.

The latter result follows as a matter of course, as a grantor can confer on one having like notice with himself no better title than he himself has.

§ 613. In Iowa, it is provided by statute, that (*bona fide*) execution purchasers of property, under a judgment that is subsequently reversed, shall not be affected in their title by such reversal.⁶

Bank of Washington, 6 Pet. 8; *Ponder v. Moseley*, 2 Fla. 207, 211; *McLagan v. Brown*, 11 Ill. 519; *Herrick v. Graves*, 16 Wis. 157; *Stinson v. Ross*, 51 Maine, 556; *Cox v. Nelson*, 1 T. B. Mon. 94; *Frost v. McLeod*, 19 La. Ann. 69.

¹ *Albee v. Ward*, 8 Mass. 79.

² *Hutchens v. Doe*, 3 Ind. 528; *Doe v. Crocker*, 2 Ind. 575.

³ *Hutchens v. Doe*, *supra*.

⁴ *McBain v. McBain*, 15 Ohio St. 327, 349.

⁵ 27 Iowa, 239.

⁶ Revision of 1873, Sec. 3199.

The courts of that State hold, however, that where an appeal is taken from a judgment, although there be no supersedeas bond given, and the plaintiff takes execution and purchases thereon pending the appeal, that such execution purchaser is not, in reference to such a transaction, a *bona fide* purchaser; that he is not within the provisions of said section 3541 (this section is similar to section 3199 of the later Revision, Code of 1873,) of the Revision, and that his grantee buying after reversal is in a like condition.¹

§ 614. And although the reversal of the judgment will not avail to set aside a sale to a *bona fide* purchaser, yet, on the other hand, holding a deed for property so sold will not estop the purchaser to deny title as emanating from such sale and from treating the reversal of the judgment as voiding the sale. The provision of the statute that a *bona fide* purchaser at execution sale is not to be affected by the reversal of the judgment, is made for the benefit of such purchasers, and can not be enforced against them so as to prevent their making title under a different source, if they elect to do so.²

§ 615. But the right of the purchaser of *personal* property sold on execution is not affected by a reversal of the judgment, which is the foundation of the writ, and such is the law whether the property remain with such purchaser or pass into the hands of others.³

§ 616. And whether the proceedings of the officer be regular or irregular in levying and selling personal property of the defendant, if he have in his hands a valid writ authorizing him to make sales of property of such description, the sale made by him at public auction, and not tinctured with fraud, is binding and carries title to the property to the purchaser if the property be delivered and paid for.⁴

¹ Twogood *v.* Franklin, 27 Iowa, 239.

² Wood, Bacon & Co. *v.* Young, 38 Iowa, 103, 109.

³ Stinson *v.* Ross, 51 Maine, 556.

⁴ Howe *v.* Starkweather, 17 Mass. 240, 243; May *v.* Thomas, 48 Maine, 397; Clark *v.* Foxcroft, 6 Maine, 296; Tuttle *v.* Gates, 24 Maine, 395; Ludden *v.* Kincaid, 45 Maine, 411; Titcomb *v.* Union M. & F. Ins. Co., 8 Mass. 326, 335.

CHAPTER XV.

EXECUTION SALES OF REAL PROPERTY.

- I. WHAT LANDS LIABLE TO SALE.
- II. DOWER LANDS.
- III. UNDIVIDED INTERESTS.
- IV. EQUITABLE AND CONTINGENT INTERESTS.
- V. THE HOMESTEAD.
- VI. IN WHAT ORDER SALE IS TO BE MADE.
- VII. THE WRIT OF EXECUTION.
- VIII. THE LEVY.
- IX. THE NOTICE OF SALE, AND RETURN.
- X. THE SALE—BY WHOM TO BE MADE.
- XI. HOW TO BE MADE.
- XII. WHO MAY NOT BUY.
- XIII. SALES IRREGULAR, OR UNDER IRREGULAR PROCESS OR JUDGMENTS.
- XIV. SALES MADE AFTER DEATH OF EXECUTION DEFENDANT.
- XV. SALES WHEN THERE IS A VALUATION LAW.
- XVI. SALES AT WHICH THE EXECUTION CREDITOR IS PURCHASER.
- XVII. SALES MADE AFTER RETURN DAY OF THE EXECUTION.
- XVIII. SALES TO THIRD PERSONS; BONA FIDE PURCHASERS.
- XIX. VOID SALES.
- XX. SALES WHEN DEFENDANT IS BANKRUPT.

I. WHAT LANDS LIABLE TO SALE.

§ 617. Lands were never liable to execution sales at common law. The remedy of the creditor was against the rents and profits. First by the writ of *levari facias*, and subsequently by writ of *elegit*. The latter was given by statute of Westminster, 2-13 Edw. I., C. 18.¹

§ 618. Next came the statute of George II., subjecting lands to execution sale in the American and other colonies. In *Bergin v. McFarland*,² the court holds the following language in

¹ Gantly *v.* Ewing, 3 How. 714; McConnell *v.* Brown, 5 T. B. Mon. 480; Erwin *v.* Dundas, 4 How. 58, 77; Bergin *v.* McFarland, 26 N. H. 536; 3 Bac. Abt. C. 688; 4 Kent, Com. 429; White *v.* Kavanaugh, 8 Rich. L. 377, 392, 393; Jones *v.* Wightman, 2 Hill, L. (S. C.) 579; Martin *v.* Latta, 4 McCord, L. 128; Pitts *v.* Bullard, 3 Geo. 10; Den, etc. *v.* Hamilton, Taylor's L. & Eq. (N. C.) 10; Woodley *v.* Gilliam, 67 N. C. 239; Suckley *v.* Rotchford, 12 Gratt. 60.

² 26 N. H. 536; White *v.* Kavanaugh, 8 Rich. L. 377, 392, 393; Jones *v.* Wightman, 2 Hill, L. (S. C.) 579; Martin *v.* Latta, 4 McCord, L. 128; Pitts *v.* Bul-

reference to this statute, BELL, Justice: "By an early British statute, lands in the colonies were subjected equally with personal estate of the debtor to the payment of debts. Stat. 5 George II.; Prov. Stat. of N. H., 1771, p. 233. And by very early statutes both of Massachusetts and of this (New Hampshire) province, power was conferred upon executors and administrators to sell the real estate for payment of debts, in case the proper courts, upon application, should deem the same necessary or proper."

§ 619. So, lands were first made liable to sale in Georgia, on execution, by the same Stat. of 5 Geo. II., by which the feudal system was dispensed with in the colonies.¹

§ 620. It is not necessary that the debtor's title should be a perfect legal one, to render lands salable on execution in said State; and lands held by an unconditional bond for title, showing the purchase money to have been fully paid, are liable.²

§ 621. And in case of execution against joint debtors, levied on the property of one of them, and sold for the joint liability, the other joint debtor may buy and take title under the sale.³

§ 622. Execution sales of lands were first authorized, in North Carolina, by the same Stat. of 5 Geo. II., Chapter 7, and were made liable to the same process as chattels. By this statute, which was re-enacted in 1777, sales of personality, and of lands, were placed upon the same footing. Before that time the lands were subject only to the writ of *elegit*.⁴

§ 623. Under this statute the execution was a lien on lands, from its teste, so that a sale by the defendant after teste of the writ was in law fraudulent as against the writ and the purchaser thereon, and the title passed to the execution purchaser.⁵ Though both kinds of property were thus made subject to sale, on writs of *fieri facias*, yet the lien by *elegit* alone related back to and dated from the judgment, and though the *fieri facias* was a lien from

lard, 3 Geo. 10; Den, etc. v. Hamilton, Taylor's L. & Eq. (N. C.) 10; Woodley v. Gilliam, 67 N. C. 239; Suckley v. Rotchford, 12 Gratt. 60.

¹ Pitts v. Bullard, 3 Geo. 5, 10.

² Ibid.; Field v. Jones, 10 Geo. 229.

³ Kilgo v. Castleberry, 38 Geo. 512. It is the policy of the law, that all shall have a right to buy, who are not concerned in selling.—Ibid.

⁴ Den, etc. v. Hamilton, Taylor's L. & Eq. (N. C.) 10; Woodley v. Gilliam, 67 N. C. 239.

⁵ Doe, d. McLean v. Upchurch, 2 Murph. (N. C.) 353.

its teste, on both realty and personality, it resulted that writs of *fieri facias* of equal date of *teste* shared equally, as sharers in the proceeds of lands sold thereon, notwithstanding some of the writs emanated from older judgments than others.¹ And they also shared alike as to the sales of personality when alike equal in date of coming into the officer's hands; for as to personality the lien attached from the time the officer received the writ.² But this priority of lien was lost if the levy of the writ first received was not duly enforced, and such forbearance was intended to favor the execution debtor;³ and though the omission of the sheriff to return the writ, after sale, of either chattels or realty, had not the effect of voiding or impairing the sale, yet for such omission, the sheriff was liable to be amerced by the court.⁴

§ 624. And so in Virginia. By the Stat. 5 Geo. II., Chapter 7, Sec. 4, lands, houses, and other property, as also in the other English colonies, were made chargeable with debts of their owners, due to the king, or to the king's subjects; and were declared assets for payment of decedent's debts in like manner and to the same extent as in England, to-wit: debts due by bond, or other specialty; and were made subject to sale accordingly;⁵ and the remedy against the living debtor's lands, in Virginia, was by writ of *ejectus*. Against the lands of a deceased judgment debtor, the remedy was by *scire facias* against the heirs.

§ 625. Up to 1831, the sale of a decedent's lands, in North Carolina, to pay his debts, was obtained by judgment against the executor or administrator ascertaining and fixing the amount of the creditor's claim, and a writ of *scire facias* thereon against the heirs, or legatees, by name, requiring them to show cause why execution should not be had of such judgment against the lands of the deceased, which had descended or been devised to them, as the case might be. Thereupon, in default to show cause to prevent it, execution was awarded against the lands, by the court, and the lands were sold thereon.⁶ If there be no judgment, however, to which the *scire facias* may relate, then,

¹ Jones v. Edmonds, 3 Murph. 43.

² Allemong v. Allison, 1 Hawks. 325.

³ Carter v. The Sheriff, 1 Hawks. 483.

⁴ Den v. Hamilton, Taylor's L. & Eq. 10.

⁵ Suckley v. Rotchford, 12 Gratt. 60.

⁶ Crawford v. Dalrymple, 70 N. C. 156.

although there be a *scire facias*, and *execution* and *sale*, the sale will be void. There must have been a judgment, or else one *revived* against the administrator or executor as the basis of a valid proceeding.¹ But by subsequent statutory regulations, the proceeding to subject a decedent's lands, in said State, to payment of debts, was and is now by the executor or administrator, as the case may be, in the nature of a civil action in probate, for an order of sale, and the sale, when made, is reported to the court for their action, and the court may *confirm* or set aside the sale, at its discretion, and from such decision there is no appeal.²

§ 626. If several parcels of land be sold to the same bidder, with just expectation of holding the whole together, and the sale is set aside as to one tract, it should also be set aside as to the others.³ The description must identify the land, else sale is void. "Seventy-five acres of a tract not to include the dwelling house," is an invalid description, and is void.⁴

§ 627. A mixed or resulting trust estate in lands is not subject to levy and sale in North Carolina. Thus lands deeded in trust to secure creditors can not be levied and sold during the existence of the debt secured. The result is uncertain, and may defeat the debtor's interest by sale under the trust.⁵

After satisfaction of the indebtedness, however, whatever remains is liable to levy and sale, and by such sale the estate, both legal and equitable, passes under the North Carolina statute.⁶

§ 628. But an uncertain equity or estate in lands, as the title of a vendor in an executory sale of lands, who has received part payment of the purchase money, or an estate in lands in reversion or remainder, before the lapse or failure of the particular estate, are not, in North Carolina, subject to levy and sale on writ of execution.⁷

§ 629. There were like statutes in Pennsylvania of early date. Hence the origin of selling lands for debt in the American colo-

¹ Crawford *v.* Dalrymple, 70 N. C. 156; Dudley *v.* Strange, 2 Haywood, (N. C.) 12; S. C., Martin & Haywood, 160.

² Lovinier *v.* Pearce, 70 N. C. 167.

³ Davis *v.* Cureton, 70 N. C. 667.

⁴ Blythe *v.* Hoots, 72 N. C. 575.

⁵ Sprinkle *v.* Martin, 66 N. C. 55; Thompson *v.* Ford, 7 Ired. L. 418.

⁶ Harrison *v.* Battle, 1 Dev. Eq. 537; Thompson *v.* Ford, *supra*.

⁷ Folger *v.* Bowles, 72 N. C. 603; Tally *v.* Walsh, 72 N. C. 336; Watson *v.* Dodd, 72 N. C. 240.

nies and States, a practice continued in most of the States at the present time, varied only in manner and effect by local regulations. In some, however, the writ of *ejectus*, and in others the remedy by extent, are resorted to.

§ 630. In some of the States the lands are not only liable to execution sale, if there be not personal property found, but the debtor, at his option, may require their sale on execution in lieu of the personality.¹

In others, if there be not personal property found, then the land is levied on, and the rents and profits are appraised for a certain term fixed by statute, and for such term are offered for sale upon the writ. If they do not command the amount of the debt, then the sale is made of the land itself.²

But the various and diversified statutory regulations in the several States are too numerous to come within the scope of our title and purpose, and will therefore not be followed out.

§ 631. The more prevalent rule now is, that in those States where execution sales are made of the realty, every legal interest of the debtor not exempt by statute is subject to levy and sale, including those that are contingent, in reversion and in remainder.³ Also rent charges⁴ and leases.⁵ And in some of the States mere equities.⁶ But the interest must be in the land itself, and not a mere permit to occupy.⁷

§ 632. In Iowa, under the statute, pre-emption rights are held to be subject to execution sales.⁸ And in several of the States an "entry or survey" of lands is such an "inchoate and incomplete legal title" as is subject to execution sale.⁹

¹ Tuttle *v.* Wilson, 24 Ill. 559; Pitts *v.* Magie, 24 Ill. 610; Cavender *v.* Smith, 1 Iowa, 306.

² Gantly *v.* Ewing, 3 How. 707.

³ Humphreys *v.* Humphreys, 1 Yeates, 427; Wiley *v.* Bridgman, 1 Head. 68; Smith *v.* Ingles, 2 Oregon, 43, 45.

⁴ Hurst *v.* Lithgrow, 2 Yeates, 24, 25.

⁵ Bisby *v.* Hall, 3 Ohio, 449; Shelton *v.* Codman, 3 Cush. 318. But in North Carolina, not the rental interest of the landlord in the growing crop of his tenant before it is set apart; prior to this both possession and ownership are in the tenant. Watson *v.* Bryan, 64 N. C. 764.

⁶ Foot *v.* Colvin, 3 Johns. 216; Kiser *v.* Sawyer, 4 Kan. 503; Jackson *v.* Bateman, 2 Wend. 570; Evans *v.* Wilder, 5 Mo. 313.

⁷ West Penn. R. R. Co. *v.* Johnston, 59 Penn. St. 294; Morrow *v.* Brenizer, 2 Rawle, 188; Thomas *v.* Simpson, 3 Penn. St. 69.

⁸ Levi *v.* Thompson, 4 How. 17.

⁹ Landes *v.* Brant, 10 How. 348; Land *v.* Hopkins, 7 Ala. 115; Thomas *v.* Marshall, Hardin, 22.

Likewise are equities of redemption;¹ but not the statutory right to redeem from execution sale.² But an interest arising under a resulting trust is liable to execution sale.³ The purchaser at execution sale has no such interest before expiration of the time allowed for redemption as may be levied and sold.⁴

§ 633. The law is well settled in Louisiana that an execution creditor who would avoid a fraudulent sale of lands made by his debtor, or by a proceeding in probate, must first bring his bill and set aside the sale for the fraud before he can levy and sell the lands on his execution.

The Supreme Court of the United States, in disposing of this subject, say: "The judgment creditor is not permitted to treat a conveyance from the defendant in the judgment, made by authentic act, or in pursuance of a judicial sale of the succession by a probate judge, as null and void, and to seize and sell the property which had thus passed to the vendee. The law requires that he shall bring an action to set the alienation aside, and succeed in the same before he can levy his execution. And so firmly settled and fixed is this principle in the jurisprudence of Louisiana, as a rule of property, and as administered in the courts of that State, that even if the sale and conveyance, by authentic act, or in pursuance of a judicial sale, are confessedly fraudulent and void, still no title passes to the purchaser under the judgment and execution." That "in effect the sale, if permitted to take place, is null and void, and passes no title." The United States Supreme Court recognize this principle as running through all the decisions of that State.⁵

§ 634. A claim of land not based upon either right or possession, is not an interest in the realty, or subject to execution sale.⁶

¹ *Waters v. Stewart*, 1 Caines Cas. 47; *Watkins v. Gregory*, 6 Blackf. 113; *Hunter v. Hunter, Walker*, (Miss.) 194; *Phelps v. Butler*, 2 Ohio, 373; *Porter v. Millett*, 9 Mass. 101; *Taylor v. Cornelius*, 60 Penn. St. 187, 195; *Covington & Cin. Bridge Co. v. Walker*, 2 Duvall, 150.

² *Watson v. Reissig*, 24 Ill. 281; *Merry v. Bostwick*, 13 Ill. 398; *Cook v. City of Chicago*, 57 Ill. 628.

³ *Foot v. Colvin*, 3 Johns. 216; *Jackson v. Bateman*, 2 Wend. 270; *Evans v. Wilder*, 5 Mo. 313, 321; *Butler v. Rutledge*, 2 Cold. 4.

⁴ *Den v. Steelman*, 5 Halst. 193; *Kidder v. Orcutt*, 40 Maine, 589.

⁵ *Ford v. Douglass*, 5 How. 143; See also *Henry v. Hyde*, 5 Martin, (N. S.) 633; *Yocom v. Bullit*, 6 Martin, (N. S.) 324; *Peet v. Morgan*, 6 Martin, (N. S.) 137; *Childress v. Allen*, 3 La. 477; *Brunet v. Duvergis*, 5 La. 126; *Samory v. Hebrard*, 17 La. 558.

⁶ *Hagaman v. Jackson*, 1 Wend. 502; *Major v. Deer*, 4 J. J. Marshall, 585.

§ 635. Lands held in trust by an executor to pay a testator's debts are equitable assets, and are not liable to execution sale in proceedings against the heirs or against the executors.¹ The trust must be executed; the proper tribunal will enforce its execution, if need be, and will see to the faithful application of the proceeds.

§ 636. Lands held by a purchaser of the United States before the issuance of the patent are subject to execution sale, as also to judgment liens.² When the patent issues, the title under the sheriff's sale relates back to the date of the entry, and so does the government patent, and title vests in the execution purchaser by such relation.³ "There is no rule better founded in law, or reason, or convenience," says the learned author of *Cruise on Real Property*, "than this: that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation."⁴

§ 637. All property which is attached to the freehold, as fixed machinery and like fixtures, passes with the same when levied upon an execution, appraised and set off to an execution creditor in satisfaction of his debt.⁵ And whether the return shows that the fixtures were appraised or not, the presumption in law is that they were, and it need not be specifically shown that they were estimated in the appraisement. It is not required that the property appraised shall be particularized in kind or description. An appraisement of the land in the aggregate is sufficient, for that includes whatever is attached to it as a part of the realty.⁶

§ 638. Instead of proceeding to sell real estate on execution, the practice, in Connecticut, is to appraise and set off to the creditor a sufficiency of the property levied to satisfy the writ.⁷ Where, as in Connecticut, the proceeding on execution, after levy, is by extent and setting off to the plaintiff a sufficiency of

¹ *Helm v. Darby*, 3 Dana, 185.

² *Huntingdon v. Grantland*, 33 Miss. 453; *Landes v. Brant*, 10 How. 348, 374; *Levi v. Thompson*, Morris (Iowa), 235; *Cavender v. Smith*, 5 Iowa, 157; *Rogers v. Brent*, 10 Ill. 573; *Jackson v. Williams*, 10 Ohio, 69.

³ *Landes v. Brant*, 10 How. 348, 372, 373, 374; *Cavender v. Smith*, 5 Iowa 157.

⁴ 5 *Cruise, Real Prop.* 510, 511.

⁵ *Payne v. Farmers & Citizens' Bank*, 29 Conn. 415.

⁶ *Ibid.*

⁷ *Bissell v. Nooney*, 33 Conn. 411; *Booth v. Booth*, 7 Conn. 350; *Brace v. Catlin*, 7 Conn. 358, 361, (note); *Peck v. Wallace*, 9 Conn. 453.

the property levied, by valuation, to satisfy the writ, it is not proper to appraise the land levied in the aggregate, and if of greater value as a whole than the amount of debt and costs, to subdivide it and set off to the creditor a *pro rata* portion thereof according to the relative quantity of the set off to the aggregate value of the whole. The particular part set off upon the writ must itself be appraised. In other words, enough must be appraised separately to satisfy the writ, and thus be set off by the officer.¹

§ 639. In some States the redemption interest of the grantor in a trust deed to secure a debt, is subject to levy and sale upon execution against the debtor.²

§ 640. In Kentucky, it has been held, under its statute, that only lands in *possession* of a debtor may be levied and sold.³

§ 641. An officer can not legally sell land for his fees only, after the judgment or execution is satisfied. He must look to the plaintiff for his costs.⁴

§ 642. The interest of the mortgagee in real property is not subject to levy and sale on execution.⁵ The mortgage is not an estate in the land, nor does it confer any estate therein upon the mortgagee, but is only a security for the debt; the mortgagee's estate is not in the land, but in the security.⁶ And this, too, whether the mortgagee is in possession or not.⁷ Until foreclosure, whether forfeited or not, it is but a pledge; the relation of debtor and creditor continues to exist, and the right of redemption remains unimpaired, and until foreclosure the mortgagee has only a chattel interest.⁸ But in order to make it available it is treated as real property in an action to recover possession of the land by him. In every other point of view it is but personal property.⁹ Nor was the mortgaged property subject to execution, levy and sale, in Mississippi, prior to the

¹ Coe *v.* Wickham, 33 Conn. 389.

² Cook *v.* Dillon, 9 Iowa, 407, 412.

³ McConnell *v.* Brown, 5 T. B. Mon. 481; Griffith *v.* Huston, 7 J. J. Marsh. 386, 388; Myers *v.* Sanders, 7 Dana, 507, 510.

⁴ Jackson *v.* Anderson, 4 Wend. 474.

⁵ Buckley *v.* Daley, 45 Miss. 338, 346, (1871); McGan *v.* Marshall, 7 Humph. 121, 127.

⁶ Buckley *v.* Daley, *supra*.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

passage of the act of 1857, on execution against the mortgagor under judgments subsequent to the mortgage, so long as any part of the mortgage debt remained unsatisfied. No title, legal or equitable, would pass to the execution purchaser under such circumstances. The High Court of Errors and Appeals declared this rule to have been well settled in that court.¹

The same rule was applied with equal force to sales on process to enforce judgments for mechanic's liens, in that State, so far as related to the land; but the lien of the mechanic, under the statute of that State, had precedence in equity as to the *building*, which is the basis of the mechanic's lien, so as to allow the removal thereof from the premises, on terms to be prescribed by the court.² But by the subsequent rulings since the passage of the act of 1857, subjecting every species of interests of a debtor in real estate to execution sales at law, we take it that the interest of the debtor in mortgaged property, and the mortgaged property itself, in that State, is now subject to execution, levy and sale, at law, on executions against the mortgagor (except in favor of the mortgagee as to the debt secured by the mortgage) as other interests are in the realty, and that the purchaser at such sales takes the interest only of the debtor in the property sold, or, in the language of one of the decisions on that subject, "stands in his shoes."³

II. DOWER LANDS.

§ 643. The right of dower may not be sold on execution before assignment or possession thereof.⁴

But dower lands held by actual possession of the tenant in dower may be levied and sold, and the possessory right will pass, and so will the growing crops, by the sale, if there be no redemption allowed by law.⁵

And so the possessory interest of a husband in dower lands

¹ *Otley v. Haviland*, 36 Miss. 19, 37; *Boarman v. Catlitt*, 13 S. & M. 149; *Wolfe v. Dowell*, 13 S. & M. 103; *Baldwin v. Jenkins*, 23 Miss. 206.

² *Otley v. Haviland*, 36 Miss. 19, 38, 39. But if there were no senior liens on the land, then the lien of the mechanic attached to the land also, as well as to the building, and might be enforced against both together. *Ibid.* 38.

³ *Carpenter v. Bowen*, 42 Miss. 28, 51, 52, 54.

⁴ *Nason v. Allen*, 5 Greenl. 479; *Gooch v. Atkins*, 14 Mass. 378; *Graham v. Moore*, 5 Har. (Del.) 318; *Pennington v. Yell*, 6 Eng. 212.

⁵ *Pitts v. Hendrix*, 6 Geo. 452.

already assigned to his wife as the widow of a former husband, may be sold.¹

III. UNDIVIDED INTEREST.

§ 644. Neither the interest of husband or wife, where they are tenants of the entirety in lands, can be sold on execution so as to pass away title that may be enforced during their joint lives, or against the survivor after the death of one of them. During their lifetime husband and wife are tenants of the entirety of lands conveyed to the two jointly and each is seized of the whole. On the death of either the entirety remains in the survivor, and such survivor becomes the sole owner of the whole estate in the land.² So no separate proceeding against one of them, during their joint lives, will, by sale, affect the title to the property as against the other one as survivor, or as against the two during their joint lives.³ Neither party to such tenancy can sell or convey their interest, for it is incapable of being separated. The husband and wife being one,⁴ therefore each is seized of the whole, and what one can not himself sell can not be sold on execution against him.⁵

How far this species of tenancy has been affected by statutory enactment of any of the States, is not our purpose here to inquire.

¹ *McConihe v. Sawyer*, 12 N. H. 396.

² 2 Bl. Com. 182; 4 Kent, Com. 362.

³ *French v. Mehan*, 56 Penn. St. 286; *McCurdy v. Canning*, 64 Penn. St. 39.

⁴ 2 Bl. Com. 182; 4 Kent, 362.

⁵ *French v. Mehan*, 56 Penn. St. 286; *Gentry v. Wagstaff*, 3 Dev. L. 270. In *French v. Mehan*, the court hold that "it is well settled that if an estate in land be given to the husband and wife, or a joint purchase be made by them during coveture, they are not properly joint tenants or tenants in common, for they are but one person in law and can not take by moieties. They are both seized of the entirety, and though the husband may have the absolute control of the estate during his life, and may convey or mortgage it during that period, neither can alienate any portion thereof without the consent of the other, and the survivor takes the whole. *Johnson v. Hart*, 6 W. & S. 319; *Robb v. Beaver*, 8 Id. 111; *Fairchild v. Chastelleux*, 1 Barr, 176; *Clark v. Thompson*, 2 Jones, 274; *Stuckey v. Keefe's Exrs.*, 2 Casey, 397; *Martin v. Jackson*, 3 Id. 504; *Bates v. Seeley*, 10 Wright, 248. If the wife survives the husband she takes the estate discharged of his debts, for the reason that she does not take it under or through him, but by virtue of the paramount grant in the original conveyance. And though the husband's interest may be sold under execution during coveture, (*Stoebler v. Knerr*, 5 Watt. 181,) yet if his

§ 645. So, in Illinois, it is held that lands belonging to husband and wife, as tenants of the entirety, are not subject to execution sale for the debt of one of them. Neither is any interest, nor the half of the interest in such lands subject to such sale. Each party, both husband and wife, is, in such cases, seized of the whole, at common law, and on the death of one the entire estate survives in the other; and therefore a sale on execution against either, during the lifetime of both, can pass no title.¹

And although by statute, the tenancy of the entirety is now virtually abolished, and rights of married women are otherwise provided for, yet the change of the law in this respect does not affect estates previously vested.²

§ 646. But undivided interests of tenants in common are subject to execution sales. The sale on execution of the undivided interests of two out of three execution defendants, in lands belonging as tenants in common to all three of the defendants, is valid, and carries title to the interests of the two, although the sale be superseded or stayed by judicial order as to the third one of the defendants and his interest, for the reason that it does not affect the right to sell the interests of the others.³

§ 647. Under the statute of Kentucky, subjecting lands to execution sale, it is held in that State that only such lands are so liable to be sold as the debtor himself might dispose of by sale and conveyance. That the language of the statute being "of the lands, tenements and hereditaments in possession, reversion, or remainder," the debt should be levied, and that the deed should "be effectual for passing to the purchaser all the estate and interest which the debtor had and might lawfully part with in the lands;" and as, by the then existing laws of Kentucky, lands adversely held could not be sold or conveyed by the owner while thus out of possession, so the power to sell on execution was limited to such lands as the debtor himself might voluntarily

creditors levy upon the estate in his lifetime, and sell it as his property, the wife may recover it on his death in an action of ejectment. *Brownson v. Hull*, 16 Vt. 309. We may add here that if a sale as against the husband, on execution against him, can affect the possession during the joint lives of the husband and wife, it can only be so, upon the principle that during that time her possession is merged in his.⁴

¹ *Almond v. Bonnell*, 76 Ill. 536.

² *Cooper v. Cooper*, 76 Ill. 57.

³ *Sheetz v. Wynkoop*, 74 Penn. St. 198.

sell and convey; and that lands adversely held against a defendant in execution could not, during such adverse possession, be subjected to execution sale.¹

It is moreover held, in the same case, in Kentucky, that a subsequent act of Assembly, enlarging the powers of owners to make sales of lands, so as to cover lands held adversely, did not authorize their sale under execution while such adverse possession continued; that while thus adversely occupied, the lands did not come within the description given in the statute of those which were to be subject to execution sale; that though the debtor might now sell and pass the title thereto, yet they were not his "in possession, reversion, or remainder," and therefore not liable under the act subjecting lands to execution and sale for debt.²

IV. EQUITABLE AND CONTINGENT INTERESTS.

§ 648. A title merely equitable, without possession, may not be sold, ordinarily, on execution. If subject thereto, it is by statutory enactment.³

§ 649. But "possession of land, (in the language of SWAN, Justice,) is an estate therein which may ripen into a right of possession and property," and "if a judgment debtor is in possession of land, it may be levied upon and sold."⁴

§ 650. In Indiana, by statute, lands fraudulently conveyed away by a judgment debtor are subject to execution sale without first being uncovered in equity from the fraud.

§ 651. And so lands held in trust for another may be levied and sold for the debt of the person for whose benefit they are held.⁵

§ 652. In Iowa, by statute, equitable interests in the realty are liable to execution sale, and judgments are liens thereon.⁶ In the case here cited the court say: "The question involves no principle not heretofore settled by this court. First, it has been

¹ *McConnell v. Brown*, 5 T. B. Mon. 479, 481; *Griffith v. Huston*, 7 J. J. Marsh, 386, 388; *Myers v. Sanders*, 7 Dana, 507, 510.

² *McConnell v. Brown*, *supra*.

³ *Haynes v. Baker*, 5 Ohio St. 253; *Thomas v. Marshall*, Hardin, 22; *Tyree v. Williams*, 3 Bibb, 366; *Allen v. Saunders*, 2 Bibb, 94; *January v. Bradford*, 4 Bibb, 566; *Gorham v. Arnold*, 22 Mich. 247.

⁴ *Haynes v. Baker*, 5 Ohio St. 253; *Jackson v. Williams*, 10 Ohio, 69.

⁵ *Tevis v. Doe*, 3 Ind. 129, 131.

⁶ *Crosby v. Elkader Lodge*, 16 Iowa, 399, 405; *Blain v. Stewart*, 2 Iowa, 378.

held that the interest of the judgment debtor in real estate is vendible upon execution, and the judgment itself operates as a lien thereon. *Harrison v. Kramer*, 3 Iowa, 543; *Blain v. Stewart*, 2 Iowa, 378." And in *Harrison v. Kramer*, supra, the Supreme Court of Iowa hold that "a judgment is a lien upon the real estate of the defendant, and by real estate is meant all right thereto and interest therein, equitable as well as legal."¹

§ 653. Lands held only by an equitable title were not at first subject to execution levy and sale, neither were they subject to a judgment lien; only the legal estate was so subject.² The remedy of the judgment creditor, as against the equitable estate of the debtor, was in equity to subject it to his judgment and execution.³ But in Oregon,⁴ "all property, or right or interest therein, of the judgment debtor," is liable to levy and sale on execution, whether held by legal or equitable title, except such as the statute exempts.⁵

§ 654. If the sale be of real property, and the same consists of several lots or parcels, then by the statute of Oregon they are to be sold "separately, or otherwise, as is likely to bring the highest price;" but this statute is there held to be merely directory, so that for omission to sell separately—that is for selling in gross—the sale will not be set aside after the time of redemption has expired, there being no appearances of fraud or other improper conduct in regard to it.⁶

§ 655. If, in Oregon, the execution sale be made to the execution creditor, he is chargeable with all irregularities; but if to a stranger to the writ, he is not so chargeable.⁷ But a sale will not be avoided, nor will the execution on which it is made be quashed for the mere reason that the writ commands the officer to make *due return* instead of *return in sixty days*.⁸

§ 656. In Maryland equitable estates or interests in personal

¹ *Harrison v. Kramer*, 3 Iowa, 543, 561. The title, when perfected by patent, to lands sold on execution when the estate was but inchoate, inures to the benefit of the execution purchaser, and by relation invests him with the fee. *Cavender v. Smith*, 5 Iowa, 157.

² *Smith v. Ingles*, 2 Oregon, 43.

³ *Ibid.*

⁴ Revised Statutes of Oregon of 1874, p. 164, Sec. 279.

⁵ 2 Oregon, 45, (*note*.)

⁶ *Griswold v. Stoughton*, 2 Oregon, 61.

⁷ *Stephens v. Dennison*, 1 Oregon, 19.

⁸ *Ibid.*

property can not be seized and sold on execution.¹ But it may be levied upon, and thereupon the plaintiff has a remedy against it, in equity, to subject it to his writ, or to sale, to satisfy the same.²

§ 657. In Texas, the remaining interest of the mortgagor—that is the legal estate—subject to the equitable lien of the mortgagee, is liable to levy and sale on execution against the mortgagor, and the purchaser takes the place of the mortgagor as to title.³ And so in New York, interests in reversion in real property may be levied and sold, and this too, even if *subject* to a contingency, and if the actual value be not ascertainable.⁴

§ 658. If a mortgage creditor in Oregon buys in the mortgage premises, under execution sale, in a proceeding of foreclosure, and buys for less than the amount of his judgment or decree—that is, than his mortgage debt—he thereby extinguishes his lien.⁵ And a subsequent judgment creditor, redeeming under the statute from such sale, takes priority thereby over the remaining balance of the mortgage creditors, or first purchaser's judgment or decree.⁶

The statute requiring the person thus redeeming to pay the amount also of any prior lien of the person of whom he redeems upon the premises, means *any distinct* lien different from and other than the one under which the sale redeemed from was made.⁷

§ 659. In Michigan, lands paid for by one person and conveyed to another, are by statute vested absolutely, as free of all trust, in the grantee of the deed, *except as against creditors of* the person paying the purchase money; as against such creditors it is *presumed*, under the statute, to be fraudulent, and when the fraudulent intent be not *disproved*, a resulting trust inures to such creditors, and the land is subject to their just demands; but this trust can only be reached and subjected to execution

¹ Rose *v.* Bevan, 10 Md. 466, 470; Martin *v.* Jewell, 37 Md. 530; Harris *v.* Alcock, 10 G. & J. 226, 251.

² Rose *v.* Bevan, 10 Md. 466; Myers *v.* Amey, 21 Md. 302, 305; Harris *v.* Alcock, 10 G. & J., 226, 251.

³ Gillian *v.* Henderson, 12 Texas, 47; Wright *v.* Henderson, 12 Texas, 43; Wooten *v.* Wheeler, 12 Texas, 338; Baker *v.* Clepper, 26 Texas, 629.

⁴ Woodgate *v.* Fleet, 44 N. Y. 1.

⁵ Chavener *v.* Wood, 2 Oregon, 182.

⁶ Ibid.

⁷ Ibid.

sale, by a creditor's bill, filed for that purpose, after execution returned, *on or after* the return day thereof, unsatisfied in whole or in part, for want of property on which to levy. The property, when thus uncovered by proceedings in equity, is then subject to execution sale of the creditors.¹

§ 660. It is not necessary, in Pennsylvania, that, to render real estate liable to sale on execution, the title or possession of the execution defendant shall be absolute, or *in presente*. All possible titles are there subject to execution and sale, whether vested or contingent, provided the defendant debtor have a real interest, legal or equitable, therein. Thus, an estate, to take effect *in futuro*, as a bequest, to vest when another person becomes of age, is liable to execution levy and sale as property of the devisee before the contingency contemplated occurs.²

§ 661. In Mississippi, as at common law, an equity of redemption from a mortgage or deed of trust was not originally subject to levy and sale, on execution at law, against the mortgage debtor or grantor of the trust.³ It could only be reached in equity.⁴

But under the act of Assembly of Mississippi of 1822, which declared every species of equitable estates and trusts subject to execution, levy and sale at law, it was held that the interest of a purchaser of land who held a bond title was liable to levy and sale, on execution at law, if the purchase money was fully paid.⁵ If, however, a *part only* of the purchase money was paid, then the interest of the purchaser was not subject to execution at law.⁶

§ 662. On sale under the statute of such equitable interest, on execution at law, when the same became liable by the full payment of the debt, the purchaser was compelled to go into a

¹ Maynard *v.* Hoskins, 9 Mich. 485; Trask *v.* Green, 9 Mich. 358; Gorham *v.* Wing, 10 Mich. 486.

² Drake *v.* Brown, 68 Penn. St. 223, 225; Rickert *v.* Madeira, 1 Rawle, 325, 329; Hunt *v.* Lithgrow, 2 Yeates, 24; De Haas *v.* Bunn, 2 Penn. St. 337. But the ruling, in North Carolina, is to the contrary. In that State, *contingent* interests in lands are not liable to execution sale. Watson *v.* Dodd, 68 N. C. 528.

³ Carpenter *v.* Bowen, 42 Miss. 28, 46.

⁴ Ibid.

⁵ Thompson *v.* Wheatley, 5 S. & M. 499. Cited in Carpenter *v.* Bowen, *supra*, approvingly by the court.

⁶ Goodwin *v.* Anderson, 5 S. & M. 730; Carpenter *v.* Bowen, *supra*.

court of equity to obtain the legal title. He bought but an equity, and his rights could only be enforced in a court of equity.¹ The same principle was held to apply to equities of redemption from mortgages and deeds of trust, and the interests of the debtor in the land. These were held to be not liable to execution sale at law so long as any of the debt remained unpaid.²

But it was also held, that when the debt, in case of a mortgage or deed of trust, or the purchase money, in cases of purchase and title bond for conveyance on payment, was fully paid off, then the mortgagee, trustee, or vendor, held but a naked legal title, and held it for the debtor, who then had the whole beneficial interest, and that such interest was then, under the statute, subject at law to execution, levy and sale.³ It was held, also, that until full payment, the debtor had no interest, in law or equity, in the property, which could be sold under process at law.⁴ For, though equities were made liable under the statute of 1822, yet the debtor had really no equity to have back or to regain the land until payment of that for which it was held was made. These rulings, in Mississippi, under the above act, conformed to and followed the rulings in the English courts made under the English Statute of Frauds, 29 Chas. II., Chap. 3, § 10, subjecting trusts to execution at law, under which the English courts held, that although so subject, it was only when the trust or debt was fully satisfied. Such was the construction put upon the statute by the English courts, and the statute of Mississippi being similar, the courts of that State followed the English ruling on the subject.⁵ But this ruling was changed subsequently, in Mississippi, in consequence of subsequent legislation. In 1857 it was enacted that "estates of any kind held or possessed for another, shall be subject to the debts and charges of the *cestui que trust*, whether the trust be *fully executed or not*, and may be sold *under execution at law*, so as to pass *whatever interest the cestui que trust may have.*" The High Court of

¹ Carpenter *v.* Bowen, 42 Miss. 28, 47.

² Ibid.

³ Ibid.; Wolfe *v.* Dowell, 13 S. & M. 103, 108. Cited and approved in Carpenter *v.* Bowen.

⁴ Ibid.

⁵ Carpenter *v.* Bowen, *supra*; Forth *v.* Duke of Norfolk, 4 Mad. (Eng. Ch.) 504.

Errors and Appeals of Mississippi hold that this latter act of the Assembly subjects all such equities of redemption, as well of mortgages and deeds of trust as other equities, to execution sales at law, whether the debt be wholly paid or not, or the trust be fully executed or not, and at any time, either before or after breach of conditions by non-payment of the debt involved, before sale under the same.¹ As the rulings under the former statute (1822) allowed such sales on execution to be made only after full payment, and that ruling was familiar to the legislature that passed the act of 1857, the courts held that the intention of the latter was to subject such interests to sale, and obviate that ruling, as well where the trust is *not*, as where it *is* fully executed, to provide for the sale of *partial*, as well as the *entire* interest of the *cestui que trust* under executions at law, and that such liability exists now accordingly, the purchaser at execution sale standing in the shoes or place of the debtor.²

§ 663. This liability is held, however, not to extend to the sale of equities of redemption on executions at law, at the suit of the mortgagee or creditor, on judgment and execution for the same debt or any part thereof which is secured by the mortgage deed or deed of trust. For such debt the creditor must proceed against the property involved in his security.³ When the execution debtor has bought of the government a tract of land, and paid for it in one way or another, but has not received the patent investing him with the legal estate, and while in that condition the land is sold on execution sale, the purchaser thereat takes the equitable estate and interest of the debtor in the land, and when the patent issues to the debtor, he becomes a trustee for the purchaser at the execution sale, and holds the legal title to the lands in trust for him, and may be compelled to convey it.⁴

§ 664. But if the debtor have no title, equitable or legal, at the time of sale, then a title subsequently acquired by him does not issue to the purchaser at execution sale. And the statute of

¹ Carpenter *v.* Bowen, 42 Miss. 28, 51, 52.

² Carpenter *v.* Bowen, *supra*.

³ Carpenter *v.* Bowen, *supra*, and p. 54; citing to the point, Goring *v.* Shreve, 7 Dana, 64; Waller *v.* Tate, 4 B. Mon. 529; Camp *v.* Cox, 1 Dev. & Batt. Law, 52; Dean *v.* Parker, 2 Ired. Eq. 40; Tice *v.* Annin, 2 Johns. Ch. 130; Atkins *v.* Sawyer, 1 Pick. 351; Washburn *v.* Goodwin, 17 Pick. 137; Thornton *v.* Pigg, 24 Mo. 249.

⁴ Kenyon *v.* Quinn, 41 Cal. 325.

California, providing that fee simple conveyances carry subsequently acquired title, has no relation to sales made on execution.¹

§ 665. Formerly, in Kentucky, under the act of Assembly of 1828, subjecting equities of redemption to sale on execution, one year was allowed to the mortgagor in which to redeem from the execution sale. But by the Revised Statutes of that State, Vol. 1, 488, the law is so far modified as to confer on the execution purchaser a lien on the equity of redemption so purchased for the amount of his bid and interest at ten per cent. thereon. By the first statute, the title of the mortgagor vested in the execution purchaser after one year, if in the meantime the mortgagor did not redeem from the sale; but under the latter statute no such title passes, but merely an indefinite right, without limit of time, in which to redeem from the same, as in case of any other lien. The amount of the execution purchase, in either case, extinguished *pro tanto* the debt for which the sale was made.² So that when the plaintiff in execution is himself the purchaser of such equity of redemption, he thereby substitutes the equitable lien or security so obtained as his security, in lieu of his judgment under which the execution sale is made, and that judgment is thereby satisfied to the amount of his bid, so that if the bid be for the full amount of the judgment, then the judgment is thereby satisfied in full.³

Now this judgment, and the execution sale thereon, being junior to the mortgage lien, the lien obtained by the execution purchaser is likewise junior thereto, and the result is, that if, on subsequent foreclosure and sale under the mortgage, the whole property be sold, and be not redeemed by the execution purchaser, the benefit and title inuring to him under his execution purchase is lost. Nor has the execution purchaser in such case any longer a claim on the judgment debtor, for, as we have seen, the judgment is satisfied by the purchase at the execution sale.⁴

§ 666. Where equitable titles to real property are subjected by law to execution sale, a purchaser in possession, who has paid the purchase money, having an equitable right to the land, the same may be sold on execution, and the purchaser takes the title

¹ Kenyon *v.* Quinn, 41 Cal. 325.

² Covington & Cin. Bridge Co. *v.* Walker, 2 Duvall, 150.

³ Ibid.

⁴ Ibid.

of and stands in the place of the execution debtor, and may, as the execution debtor could have done, maintain a bill in equity, and coerce a specific performance against the vendor who still holds the legal title, and thus have the same conveyed to the execution purchaser.¹

V. THE HOMESTEAD.

• § 667. We come now to treat of the homestead; not, however, in general terms, for such are not within the compass of our work; but our province here is to treat only of its liability to, or exemption from sale under the execution laws of the several States. As a general principle, this exemption, where it exists, necessarily carries with it exemption also of the homestead from judgment lien, the ruling being, that although judgments at law are ordinarily a lien on the lands of judgment debtors, yet they are not so as to the lands occupied as a homestead; and if the homestead be abandoned by sale, conveyance and delivery of possession by the debtor while a judgment exists against him, the lien thereof, as a general principle, does not attach to the premises, but the grantee takes a clean title to the same, so far as regards the judgment, and an execution sale thereof under the judgment is void.² To this, however, there are exceptional decisions.³

The same doctrine is held in Iowa. The lien being the creature of the statute, it can only apply where the statute applies it. The law giving the lien and the law granting the homestead are to be construed together.⁴ A judgment lien can only be co-extensive with the right to enforce it.⁵

¹ Morgan *v.* Bouse, 53 Mo. 219.

² Morris *v.* Ward, 5 Kan. 239; Lamb *v.* Shays, 14 Iowa, 567; Cummings *v.* Long, 16 Iowa, 41; Revalk *v.* Kraemer, 8 Cal. 66; Wiggins *v.* Chance, 54 Ill. 175; Green *v.* Marks, 25 Ill. 221; Fishback *v.* Lane, 36 Ill. 437; Bliss *v.* Clark, 39 Ill. 590; Haworth *v.* Travis, 67 Ill. 301; Conklin *v.* Foster, 57 Ill. 104.

³ Folsom *v.* Carli, 5 Minn. 333, 338; Lamb *v.* Shays, 14 Iowa, 570.

⁴ Lamb *v.* Shays, 14 Iowa, 567; Cummings *v.* Long, 16 Iowa, 41.

⁵ Scriba *v.* Deane, 1 Brock. 166; Bank of U. S. *v.* Winston, 2 Brock. 252; Shrew *v.* Jones, 2 McLean, 78; Bliss *v.* Clark, 39 Ill. 590; Lamb *v.* Shays, 14 Iowa, 567. The learned court in this case, BALDWIN, Justice, dispose of this subject in the following forcible language: "The section in relation to the liens of judgments of the Supreme and District Courts, and the one giving to the owner of the homestead the exemption, were passed by the Legislature at the same time; the one giving to the judgment creditor a lien on the lands

In the case cited from 5th Kansas, the subject is discussed by Judge VALENTINE with great ability, and the same conclusion is arrived at as by the Supreme Court of Iowa.¹ The same is sub-

of the defendant, and the other denying him the right to enforce it so far as the homestead is concerned. The right of the judgment creditor to seize or to enforce his judgment by selling the lands of the debtor exists only by force of the statute, and is regulated altogether by its provisions. The lien of a judgment upon lands in this State being conferred by statute, it can only have such force as is given thereby, and it can only attach and become effective in the manner, at the time, and upon the conditions and limitations imposed by the statute itself. A lien without the power to enforce it carries with it no advantage to the owner thereof. It can not be enforced as against the homestead, because it is exempt from judicial sale. It is inoperative, and can not be otherwise as long as the homestead is used as a home. Construing the two sections together, having been passed at the same time by the Legislature, we think that it could not have been designed that the lien should ever attach upon property that was declared exempt from judicial sale. This exemption exists only so long as the homestead is occupied and used as a home. The moment it ceases to be used as such, the lien attaches, the same as it attaches against property acquired by the judgment debtor after the judgment is rendered, and the priority of liens can be determined in the same manner. If, therefore, this lien does not attach so as to be effective against the owner, how can it affect the rights of a purchaser of the homestead property? The right of exemption continues until the sale and delivery of the deed to the vendee, and the lien can not attach until after sale and delivery, nor until after it ceases to be occupied by the owner. Prior to this the vendee's rights become absolute." Lamb *v.* Shays, *supra*.

¹ In this case the court hold the following principles and language: "It is claimed that the judgment lien remains simply dormant during the time that the land is occupied as a homestead, and that as soon as it is transferred and ceases to be occupied as a homestead the lien attaches and becomes effective. Now suppose the husband, in whom the title is vested, dies. The title to the property is immediately, by law, transferred from him to his widow and children, and he ceases to occupy the property as a homestead, will the judgment lien then attach and take the homestead away from the widow and children? And suppose the whole family die, except those children born after the judgment was rendered, can those children hold the property as a homestead? If they can, then where is the certainty of a judgment lien ever attaching to a homestead and becoming effective? And as long as the lien is not effective it is practically no lien at all. In the case at bar, several days before the land was abandoned as a homestead, and, therefore, several days before the judgment lien could have any practical existence, the land was conveyed to Morris. Then when did this lien attach and become effective? Upon the whole, we decide the questions in this case as follows: 1. A mortgage of the homestead, executed by the husband alone, is void. 2. A judgment rendered against the husband alone is not a lien on the homestead. 3. Neither is such a mortgage, nor such a judgment, any incumbrance on land owned by the husband, and occupied by himself and family as a homestead. 4. Such land may be sold and conveyed by the husband and wife jointly, and

stantially the ruling in Illinois. It is there held that neither judgment nor levy will operate as a lien upon the homestead. That temporary abandonment of the same, with intent to reoccupy it as homestead, though rented out in the interim, will not subject it to lien, of judgment, levy, or to sale. That a grantee of the owner holds against a prior judgment which would have been a lien on the land but for the homestead law; and that if sold on execution, the sale, on application, will be set aside.¹

the purchaser will take the title free and clear from all incumbrances, notwithstanding said mortgage and judgment. 5. After said sale and conveyance, and after the land has been abandoned as a homestead, if an execution issue on said judgment, and the land be sold under said execution, the sale is void. 6. After said sale and conveyance, and abandonment, if a decree of foreclosure be entered on said mortgage against the husband, in a suit in which the wife is not a party, the decree is void so far as it affects her interests, and is no evidence of anything as against her." *Morris v. Ward*, 5 Kan. 247, 248, 249.

¹ *Green v. Marks*, 25 Ill. 221; *Stevenson v. Marony*, 29 Ill. 534; *Fishback v. Lane*, 36 Ill. 437; *Bliss v. Clark*, 39 Ill. 590; *Cipperly v. Rhodes*, 53 Ill. 346; *Wiggins v. Chance*, 54 Ill. 175. The opinion of the court in this case is as follows: "The evidence shows that this land was a part of appellee's homestead when the levy and sale were made, and the whole property was worth less than \$1,000, and there is no pretence that the homestead right was waived or released in the mode prescribed by the law. In the case of *Green v. Marks*, 25 Ill. 221, it was held that the law exempted the homestead of the debtor from levy and sale on execution, and they created no lien on the homestead while the debtor was in a position to claim the benefits of the land. In the case of *Stevenson v. Marony*, 29 Ill. 534, it was held that when the homestead is sold, and the debtor is in a position to claim the benefit of the act, he may have the levy and sale set aside. And in the case of *Fishback v. Lane*, 36 Ill. 437, it was held that the grantee of the debtor held the land as against a prior judgment, which would have been a lien had it not been for the homestead law, and that case was based upon the prior case of *Bliss v. Clark*, but not reported until the 39 Ill. 590, and upon *Green v. Marks*, supra. It is manifest, from those cases, that there was no lien created on this homestead by issuing the execution, the levy, or the sale, and that the sale was void and passed no title to Garrison. He or appellee could have applied to the court and had the levy and sale set aside, as nothing was acquired thereby. It is urged that appellee, subsequently to the sale, abandoned the premises by removing from them for some months and by leasing the place. He swears he only left to earn money to pay his debts, intending to return and continue it as his home, which he did, and nothing is found in the record to rebut this evidence. But even admitting that he did not intend to return, how is the case changed? If the levy created no lien, and the sale transferred no title, how could appellee's subsequent abandonment render this void sale valid? How could it impart vigor to the sale and conveyance by the sheriff, which was unauthorized, and conferred no title? We are at a loss to perceive how

But that whether set aside or not, such sale is absolutely void, and not even a permanent abandonment of such homestead subsequent to such void sale can render the sale valid which was invalid before.¹

§ 668. On an abandonment of the homestead, there being several judgments against the owner, the first levy made thereon will take priority. There being no lien of either judgment on the premises while they continue to be a homestead, a release of the homestead privilege in favor of the plaintiff in execution of a junior judgment and a levy of his execution then in the sheriff's hands, will take precedence over the senior judgment and the levy of an execution subsequently issued thereon and levied on the same land.²

§ 669. But although the homestead may be liable, if no other property be found out of which to make the debt, for a debt contracted before the acquisition thereof, yet if a creditor holding one such debt, and another of inferior grade, in point of time to the date of the homestead, and by suing both debts in one suit obtains a common judgment for the aggregate amount of the two, then the homestead is not liable to levy and sale under process of execution issued upon such judgment, for it is a well settled principle of law that a creditor having two classes of claims against a debtor, and uniting them in one suit obtains judgment, reduces that in which the rights are *superior* to a level with that in which they are *inferior*. He can not, by blending the two, give to one rights which the law denies to it when proceeded on singly.³

§ 670. And so, upon the same principle, where a creditor commingles in his judgment two claims—for one of which he has an attachment lien, and for the other no lien—then he has no lien older than the execution levy itself, for either; as the judgment is an *entirety*, it results that although there would be a lien if taken for the amount of the *attachment levy only*, and

appellee's position could be thus changed. Failing to perceive that appellant had shown any defense, we must hold the court below acted correctly in rendering the judgment, and it must be affirmed."

¹ Wiggins *v.* Chance, 54 Ill. 175, and cases there cited.

² Bliss *v.* Clark, 39 Ill. 590.

³ Holmes *v.* Farris, 63 Maine, 318; Baker *v.* Gilman, 52 Barb. 26; Moritz *v.* Hoffman, 35 Ill. 553; Bicknell *v.* Trickey, 34 Maine, 273; Reed *v.* Woodman, 4 Maine, 400; Usher *v.* Hazletine, 5 Maine, 471; Miller *v.* Miller, 23 Maine, 22; Quimby *v.* Dill, 40 Maine, 528.

that lien would relate back to the date of the attachment levy, yet by confounding the two into one judgment, the lien is created only by the *execution* levy, and relates back no further than to such levy, and confers title only as of that date.¹ We say *confers* title, for, as in Maine, from whence the authorities here cited are derived, the title is *passed* by an *extent*. That is, the levy on an execution, duly made and within the time required by law, upon real property, operates as a statute conveyance, of the land to the creditor;² and by relation refers itself and its legal effect back to the date of the levy of the writ of attachment, if there was one levied in the suit upon the same property.³ If no attachment levy, then the title vests from the date of making the execution levy; that is, from the seizure.⁴

VI. IN WHAT ORDER TO BE SOLD.

§ 671. When a part of the lands subject to a judgment lien are sold by the judgment debtor after the lien has attached, yet if a sufficiency thereof still remains to realize the judgment, the creditor must in equity make his levy on and sale of the part so remaining; and if the part so remaining unsold be not sufficient to discharge the whole amount, yet the creditor must exhaust the same before proceeding against the part so sold by the debtor; and so likewise he must exhaust any other property of the debtor, provided it does not interfere with intervening equities or rights of other creditors.⁵

§ 672. By some authorities, if lands subject to judgment lien be sold by the judgment debtor to several different purchasers, in parcels, and at different dates, after the lien of the judgment has attached, so as to leave no remaining unsold part thereof suffi-

¹ Morse *v.* Sleeper, 58 Maine, 329.

² First National Bank of Salem *v.* Redman, 57 Maine, 405.

³ Ibid.; Brown *v.* Williams, 31 Maine, 404.

⁴ Morse *v.* Sleeper, 58 Maine, 329; Clement *v.* Garland, 53 Maine, 427; French *v.* Allen, 50 Maine, 437. As against the *debtor* the levy is valid without being recorded; but to operate as against others who are *bona fide* purchasers, it must be returned and recorded. Hanley *v.* Sidelinger, 52 Maine, 188; Benson *v.* Smith, 42 Maine, 414.

⁵ Clowes *v.* Dickenson, 5 Johns. Ch. 235; and same case on appeal, 9 Cow. 405, where the court entertained the same opinion, although the case was remanded, but for a wrong decision on some other point; Hurd *v.* Eaton, 28 Ill. 122; Bates *v.* Ruddick, 2 Iowa, 423; Massie *v.* Wilson, 16 Iowa, 391; Barney *v.* Myers, 28 Iowa, 472.

cient to satisfy the judgment then in equity, after exhausting what remains, the judgment creditor may be compelled to resort to those parcels last disposed of, in their several orders of conveyance, on which to levy for his debt. That is to say, the parcel last sold is first to be exhausted; then the next; and so on in order until the debt is satisfied, or the parcels be all exhausted. So in like manner as to mortgage liens.¹ They are to be sold in the inverse order of their sale by the execution debtor.

By others it is held, however, that while the rule is recognized that on sale of a part only of the lands subject to the lien, by the judgment debtor, the execution creditor in enforcing his judgment lien, is in equity bound to exhaust the remaining portion still belonging to his debtor before proceeding against the part that has been sold; yet that if the whole be sold in different parcels and at different dates, instead of the creditor having to sell the parcels in the inverse order of their sale by the debtor, he may coerce an equal *pro rata* contribution out of each, in proportion to the value thereof respectively.² The former we conceive to be the better ruling. Yet each must be regarded as

¹ *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Wisconsin v. Titus*, 17 Wis. 241; *N. Y. Life Ins. Co. v. Milnor*, 1 Barb. Ch. 353; *Marshall v. Moore*, 36 Ill. 321; *Mason v. Payne*, (S. C.) *Walker*, Ch. 459; *Carey v. Folsom*, 14 Ohio, 365; *Schryver v. Teller*, 9 Paige, 173; *Rathbone v. Clark*, 9 Paige Ch. 648; *LaFarge Ins. Co. v. Bell*, 22 Barb. 54; *Ogden v. Glidden*, 9 Wis. 46; *Aiken v. Bruen*, 21 Ind. 137; *Gill v. Lyon*, 1 Johns. Ch. 447. In *Clowes v. Dickenson*, 5 Johns. Ch. 235, the following is said by the Chancellor: "If there be a judgment against a person owning at the time three acres of land, and he sells one acre to A., the two remaining acres are first chargeable, in equity, with the payment of the judgment debt, as we have already seen, whether the land be in the hands of the debtor himself or his heirs. If he sells another acre to B., the remaining acre is then chargeable, in the first instance, with the debt as against B. as well as against A., because when B. purchased he took his land chargeable with the debt in the hands of the debtor in preference to the land already sold to A. In this respect we may say of him, as is said of the heir, he sits in the seat of his grantor, and must take the land with all its equitable burdens; it can not be in the power of the debtor, by the act of assigning or selling his remaining land, to throw the burden of the judgment, or a ratable part of it back upon A. * * * * The case is not analogous to a rent charge, which grows out of the land itself, and where every purchaser of distinct parcels of a tract of land charged with the rent takes it with such a proportionate part of the charge." But in cases of mortgages and judgment liens "the charge on the land (says the learned Chancellor) is only by way of security."

² *Bates v. Ruddick*, 2 Iowa, 423; *Massie v. Wilson*, 16 Iowa, 390, 391; *Barney v. Myers*, 28 Iowa, 472; *Parkman v. Welch*, 19 Pick. 231; *Jobe v. O'Brien*,

law within the jurisdiction of the tribunals making these diverse rulings.

§ 673. If there be senior and junior judgment liens in favor of different creditors against the same premises of a judgment debtor, and the junior judgment creditor execute and sell a portion of the lands so subject to the judgment liens, then a *bona fide* purchaser under the execution sale of the junior creditor, will, in equity, have a right to turn the senior judgment creditor over to the remaining part of the lands of the debtor, for satisfaction of his judgment, either in the whole, or as far as the same will go, before such senior judgment creditor can come upon the part so sold under the junior judgment.¹

In *United States v. Duncan*,² the court, DRUMMOND, Justice, says: "The doctrine that where a man owns different parcels of land and transfers some of them, himself also retaining some, all the parcels being subject before the transfer to a general incumbrance made by him, the part which he still retains shall be applied to the payment or discharge of that general incumbrance, rather than that which he has transferred, is founded on the plainest principles of equity. It would be manifestly unjust that those persons to whom he had made transfers should be compelled to pay off the incumbrance when he held land which would satisfy it."

VII. THE WRIT OF EXECUTION.

§ 674. If a judgment be valid, an execution issued thereon can not be impeached collaterally. It is good until superseded or set aside.³ But if the judgment be void, an execution thereon

² Humph. 34; Dickey *v.* Thompson, 8 B. Mon. 312; Green *v.* Ramage, 18 Ohio, 428.

¹ Wise *v.* Shepherd, 13 Ill. 41; Hurd *v.* Eaton, 28 Ill. 122; Marshall *v.* Moore, 36 Ill. 321. The reason of the rule for selling by inverse order is, that when a part only is sold by the debtor, then, in equity, the unsold remainder as between him and his grantee becomes primarily liable for the debt, and if subsequently sold, the purchaser takes it liable to this charge, for if the prior conveyance be of record so as to confer notice thereof, then the second purchaser takes no better right than his vendor had. Mason *v.* Payne, Walker, Ch. 459.

² 4 McLean, 607, 624.

³ 3 Bac. Abt. Tit. Execution (A.); Stewart *v.* Stocker, 13 Sergt. & R. 199; Durham *v.* Heaton, 28 Ill. 264.

is void also,¹ and may be so treated, however brought in question Executions, to be regular, must issue within the life time of the judgment, which, at common law, is a year and a day. The time in most, if not all of the several States, in which a judgment becomes dormant, is regulated by statute.

§ 675. And though the writ be voidable for irregularity, yet, if not in law void, it does not become inoperative and wanting in force by reason thereof, if not set aside, but proceeding and sale under it will be valid.²

In the case of *Bryan v. Hubbs*, above cited and reported in the 69th North Carolina, the irregularity consisted in omission to teste the writ, as of a day in term, as provided by statute, the court held that the statute was but directory, and that therefore the omission, though an irregularity, did not void the writ.

§ 676. An execution issued on a dormant judgment is fraudulent as against a subsequent *bona fide* purchaser, who buys while the judgment is dormant.³ A writ of *venditioni exponas*, directing a sheriff to sell lands specifically described as condemned by judgment in attachment proceedings, is not invalidated by a division of the county after the teste of the writ, and before the

¹ 3 Bac. Abt. Tit. Execution, (A.); *Albee v. Ward*, 8 Mass. 79.

² *Sterrett v. Howarth*, 76 Penn. St. 438; *Sheetz v. Wynkoop*, 74 Penn. St. 198; *Wilkinson's Appeal*, 65 Penn. St. 189; *Stewart v. Stocker*, 13 Sergt. & R. 199; *Lowber's Appeal*, 8 W. & S. 387; *The State v. Morgan*, 7 Ired. L. 387; *Bryan v. Hubbs*, 69 N. C. 423; *Bennett v. Gamble*, 1 Tex. 124; *Boggess v. Howard*, 40 Tex. 153. (And only a party to the writ can take advantage of such irregularity, and then only directly, and not collaterally. *Ibid. Ayres v. Duprey*, 27 Tex. 593; *Snydor v. Roberts*, 13 Tex. 598; *Hancock v. Metz*, 15 Tex. 205, 209; *Hawley v. Bullock*, 29 Tex. 216; *Andrews v. Richardson*, 21 Tex. 287.) The case of *Boggess v. Howard*, above cited, overrules the decision of *Johnston v. Shaw*, 33 Tex. 585, as to the ruling in the latter case, that irregularities void a sale on execution, and it re-asserts, as the law in Texas, the general principle that sales made on irregular process are merely *voidable*, and *not void*, and must be avoided, if at all, by some direct proceeding. As to the generality of this principle, see *Jackson v. Robins*, 16 Johns. 537; *Thompson v. Phillips*, 1 Bald. C. C. 246; *Swiggart v. Harker*, 5 Ill. 364; *Pollard v. Cocke*, 19 Ala. 188; *Miles v. Knott*, 12 Gill. & J. 442; *Williams v. Whipple*, 40 Vt. 219; *Mariner v. Coon*, 16 Wis. 465; *Voorhees v. Bank U. S.* 10 Pet. 419; *Love v. Powell*, 5 Ala. 58; *Jones v. Davis*, 24 Wis. 229.

³ *Ball v. Shell*, 21 Wend. 222; *Kellogg v. Griffin*, 17 Johns. 274. (But it is valid, and so is a sale thereon as against the execution debtor himself, if no steps be taken by him within a reasonable time to avoid or set aside the same. *Mariner v. Coon*, 16 Wis. 465; *Jones v. Davis*, 24 Wis. 229.)

day of sale, although the lands to be sold be situated in the new county formed by such division; but the sheriff may go on and sell, and the sale will, in that respect, be valid.¹

On general principles, an execution and sale thereon issued against two defendants, after the death of one of them, is void, and no title passes by the sale. The judgment should be revived as to the deceased defendant. The plaintiff can not proceed otherwise without the aid of a statute. Execution can not go against the survivor alone, nor can it go against the survivor and the dead defendant, or his executor or administrator jointly. The proper course is to revive the judgment.²

§ 677. But in the State of Mississippi (under the code,) it is held that where judgment is against two or more defendants, and one dies, execution may go against the survivor or survivors; and that the writ will be good against the survivor or survivors, although it omit to mention the death of the co-defendant who is dead.³

§ 678. In Tennessee, if plaintiff die before execution issues, the judgment must be revived, as is the general rule, by *scire facias*. If, however, execution be issued, or bears teste, prior to his death, the writ may be levied and enforced by sale with the same effect as if the plaintiff were still living.⁴

§ 679. It is held in Illinois, that although it is the more proper practice, where a judgment creditor dies before execution issues, to "recite" in the execution "the fact of the recovery of the judgment, the death of the defendant," and to also state that notice of the judgment has been given to the administrator of the deceased, and thereupon command the sheriff to levy on the lands of the decedent which he owned at the time of his death; yet an execution issued against the defendant in the ordinary way will be substantially good.⁵

§ 680. Execution against a party for costs created by himself, there being no judgment against him, is void, and so is any sale made by virtue thereof.⁶

¹ *Tyrell v. Roundtree*, 7 Pet. 464.

² *Erwin v. Dundas*, 4 How. (U. S.) 58, 59.

³ *Wade v. Watt*, 41 Miss. 248.

⁴ *Gregory v. Chadwell*, 3 Cold. 390.

⁵ *Wight v. Wallbaum*, 39 Ill. 554, 563.

⁶ *Washington v. Ewing*, Mart. & Yerg. 45; *Crisswell v. Ragsdale*, 18 Tex. 448.

§ 681. The execution must conform substantially to the judgment. A want thereof will avoid the sale.¹

If there be not substantial correspondence between the execution and the judgment, a sale made on such execution may be impeached in a collateral proceeding.² But a mere clerical variance will not be cause for such collateral impeachment.³

§ 682. By statute, in Indiana, process of execution is required to be sealed with the seal of the court, and it is there held that an execution for a foreclosure decree not so sealed is invalid, and that a sale thereon by the sheriff is void, and his deed will not confer title on the purchaser at such sale.⁴

§ 683. Though an execution can not issue against a party that is dead, without revival,⁵ yet if there be several persons plaintiffs in a judgment, and one dies, it is held, in Massachusetts, that it may still issue in the joint names of the plaintiffs.⁶

§ 684. Where there are several judgments against the same debtor, and none of the judgments are liens, then the first execution which is levied takes priority.⁷

§ 685. The application of the proceeds of these sales, under the statute of the State of South Carolina,⁸ in the absence of liens, requiring a different rule, is, where there are senior and junior writs in the officer's hands, first to the senior writ, as to time of reception by the officer, and so on in order of priority of time of coming into the officer's hands.⁹

§ 686. Under the Revision of Iowa of 1873, if one or all of the judgment plaintiffs be dead, still an execution may issue in their name or names, as if living, by the clerk's endorsing thereon the death of such as are dead, and the names of their personal representatives or last survivor, if the judgment has passed to the

¹ Commonwealth *v.* Fisher, 2 J. J. Marsh. 137; Crittenden *v.* Leitensdorfer, 85 Mo. 239; Hightower *v.* Handlin, 27 Ark. 20; Hastings *v.* Johnson, 1 Nev. 613. But a trivial variance will not void it. Ibid.

² Rider *v.* Alexander, 1 D. Chip. 267, 274; Butler *v.* Haynes, 3 N. H. 21.

³ Butler *v.* Haynes, 3 N. H. 21.

⁴ Ins. Co. *v.* Hallock, 6 Wall. 556.

⁵ Hildreth *v.* Thompson, 16 Mass. 191.

⁶ Hamilton *v.* Lyman, 9 Mass. 14; Bowdoin *v.* Jordan, 9 Mass. 160.

⁷ Lathrop *v.* Brown, 23 Iowa, 40.

⁸ White *v.* Kavanagh, 8 Rich. L. 337; Jones *v.* Wightman, 2 Hill, L. (S. C.) 579; Martin *v.* Latta, 4 McCord, L. 128.

⁹ Lynch *v.* Hanahan, 9 Rich. L. 186, 189; Woodley *v.* Gilliam, 67 N. C. 237; Ricks *v.* Blount, 4 Dev. L. 128.

personal representatives, or the names of the heirs, if the judgment is for real property; but the making and filing with the clerk, by one of the plaintiffs, if one be still living, or by his personal representatives, or heirs, or attorney, an affidavit of the truth of such statement, or if the application be by personal representatives alone, then they shall file with the clerk a certificate of their qualifications as such.¹ An execution issued and levied in the name or names of deceased plaintiffs, without these preliminary requisites being complied with, is void, and will be enjoined accordingly.²

§ 687. So in Arkansas, execution may be enforced against the property of the surviving defendant or defendants, without revivor of the judgment, where one or more of the defendants are dead, but the writ must be issued against them all, by name, as if all were still living, and the death of those who are dead, is to be suggested by the clerk, in writing thereon; to this end, it is not required that proceedings be had against the representatives of those who are dead, or that they be brought into court.³

§ 688. But, although execution may be had against the property of the survivors, yet it does not follow that where there being only one judgment defendant, and he dies, or where all of several judgment defendants, are dead, that execution may issue without revivor of the judgment; for the sale is to be made of the property of the *survivor* or *survivors*, and in the latter case there are no survivors; and if execution be had of the property of those who are dead, the sale, though not absolutely void, will be set aside on application of the heirs at law, if the purchase is made with notice of the death and of the non-renewal of the judgment; for in such case the buyer is not a *bona fide* purchaser.⁴

§ 689. But the proceeding to set the sale aside, in such case, must be a direct one, in which the purchaser has his day in court.⁵

¹ Revision of Iowa, 1873, Secs. 3130, 3131, et seq.

² Meek *v.* Bunker, 33 Iowa, 169.

³ Bowen *v.* Bonner, 45 Miss. 10.

⁴ Cook *v.* Toumbes, 36 Miss. 685; Smith *v.* Winston, 2 How. (Miss.) 601; Shelton's Lessee *v.* Hamilton, 23 Miss. 496; Hodge *v.* Mitchell, 27 Miss. 560. (But if set aside; *Quære?* If the purchaser be not entitled to have back the purchase money paid by him, or to be subrogated to the benefit of the judgment in lieu thereof. Cook *v.* Toumbes, *supra*; and Tiffany *v.* Johnson, 27 Miss. 227.)

⁵ Hodge *v.* Mitchell, 27 Miss. 560; Shelton's Lessee *v.* Hamilton, 23 Miss. 496; Tiffany *v.* Johnson, 27 Miss. 227.

§ 690. Though taking the body in execution works a satisfaction of the writ,¹ yet to do so, there must be an actual arrest—a substantial duress of the person²—mere threats of taking the body unless payment be made, will not amount to a taking, and if by reason thereof, the debtor execute a bond with security for payment of the writ at return day thereof, the bond will be valid.³

§ 691. Formerly, in Rhode Island, the writ ran against the goods and chattels of the defendant, and for want thereof, against the body,⁴ and not against the realty except where the defendant was out of the State.⁵ But by the Revised Statutes of that State the writ of execution now runs as well against the realty as against the goods and chattels and body of the execution defendant.⁶

And though judgment be rendered before, and the writ issue after the enactment of the Revised Statutes, the writ goes against the lands, personal estate and body of the defendant,⁷ and this, too, though the defendant has been discharged under the insolvent act, and he protects his body in this latter case from arrest by the production of his written discharge, to the officers. The writ itself will be valid.⁸

§ 692. Common law, or general writs of execution, issued upon special judgments, are void.

The writs in such cases should be special, and conform to the judgment, in every particular, and where the judgment designates the property to be sold, then the execution should do the same.⁹

§ 693. So, likewise, in cases of decrees, whereby the sales are directed to be made on *execution*.¹⁰

But a disregard of mere directory requirements of the law, in making execution sales, will not affect the validity of the sale,

¹ McCrillis *v.* Sisson, 1 R. I. 143.

² Ibid.

³ Ibid.

⁴ Taylor *v.* Ames, 5 R. I. 361, 367.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Wright *v.* Watson, 30 Geo. 648; Carithers *v.* Venable, 52 Geo. 389.

¹⁰ Reese *v.* Burts, 39 Geo. 565; Horne *v.* Spivey, 44 Geo. 616.

as a general rule.¹ If, however, such omission works an injury, the officer is liable in an action therefor.² As for instance, neglect to advertise the sale.³

§ 694. And the rule of *caveat emptor* applies to execution sales. The officer's deed is but in legal effect, a *quit* claim of the debtor's right; he has no power to warrant.⁴ If title fails, this will not enjoin the paying over of the purchase money.⁵

VIII. THE LEVY.

§ 695. An execution levy of lands, is made by an endorsement thereof upon the writ. There is no such thing as seizure of the premises. Until such entry in writing on the writ, there is, in law, no levy made.⁶

§ 696. In Louisiana, the levy is complete by registering notice thereof under the act of 1870 and endorsing the same on the writ, and giving notice to the debtor.⁷

§ 697. A sale without such notice of levy, to the debtor, is void.⁸

§ 698. And so a sale without the property being appraised, is void, although assented to by the debtor in failing condition; for other creditors' rights may not thus be prejudiced.⁹ Such consent and sale can not be objected to by third persons, not creditors, but independent claimants of the property, in a controversy between them and the execution purchaser.¹⁰

§ 699. When the sale is required to be at the court house, and a new court house be, by law, procured, after advertisement

¹ *Hendricks v. Davis*, 27 Geo. 167; *Johnson v. Reese*, 28 Geo. 353.

² Same cases as cited above.

³ *Solomon v. Peters*, 37 Geo. 251; *Brooks v. Rooney*, 11 Geo. 423.

⁴ *Methvin v. Bexly*, 18 Geo. 551, 649.

⁵ *Ibid.*

⁶ *Isam v. Hooks*, 46 Geo. 309; *Baltimore v. Parlange*, 25 La. Ann. 335, 337; *Birch v. Bates*, 22 La. Ann. 198.

⁷ *Baltimore v. Parlange*, 25 La. Ann. 335, 337; *Birch v. Bates*, 22 La. Ann. 198. (If the debtor points out the property, no notice to him is necessary. *Hewitt v. Stephens*, 5 La. Ann. 640; *Bermudez v. The Union Bank*, 11 La. Ann. 64; *Le Blanc v. Dubroca*, 6 La. Ann. 300. This is a waiver of notice—*Ibid.*)

⁸ *Birch v. Bates*, 22 La. Ann. 198.

⁹ *Succession of Hiligsberg*, 1 La. Ann. 340; *Phelps v. Rightor*, 9 Rob. (La.) 531; *McDonough v. Gravier*, 9 La. :30; *Lawrence v. Young*, 1 La. Ann. 297; *Stockton v. Stanbrough*, 3 La. Ann. 390.

¹⁰ *Chapman v. New Orleans Gas Co.*, 4 La. Ann. 153.

of sale, then it is held that the advertisements should be removed to the new court house and sale be made thereat.¹

§ 700. The terms and description of the advertisement bind the purchaser and seller. Oral variations are not allowed.² The levy can not be made after the return day of the writ.³

§ 701 The levy must describe the land levied upon with sufficient certainty to enable it to be identified without other evidence.⁴ Therefore, where all the calls in a levy are properly answered, and yet the description is such that the land levied on could not therefrom be identified or certainly found, the levy is void for uncertainty. It should be such that a sheriff could know what to put a party in possession of.⁵ And so a levy of "all the unsold land in a forty thousand acre tract" is void.⁶ Likewise a levy of five hundred acres, to be taken off the most northerly side of a widow's dower lands, without other identity of the lands, is void.⁷

§ 702. Though a levy must ordinarily describe the land with such certainty as will enable an officer to find and identify it, yet a levy in that respect defective may be cured and rendered valid by the more perfect and sufficiently correct description contained in the appraisement, where the proceeding is under an appraisement law;⁸ and so, likewise, a defective levy, as to the description of the land, is cured by a correct description in the sheriff's deed.⁹

§ 703. If several judgment creditors have judgments of equal date, and their judgments are in law all liens on the real estate of the same defendant, the one that levies thereon first obtains priority.¹⁰

¹ Union Bank *v.* Smith, 3 La. Ann. 147. If made elsewhere the sale is void—Ibid.

Layton v. Hennen, 3 La. Ann. 1; *Burk v. Creditors*, 9 La. Ann. 1.

² 3 Bac. Abt. Execution, 734; *Gaines v. Clark*, 1 Bibb, 608.

³ *Huddleston v. Garrott*, 3 Humph. 629; *Pound v. Pullen's Lessee*, 3 Yerg. 338; *Shields v. Batts*, 5 J. J. Marsh, 13; *Williamson v. Perkins*, 1 Har. & J. 449; *Sumner v. Moore*, 2 McLean, 59.

⁴ *Chadbourne v. Mason*, 48 Maine, 389, 393; *Gault v. Woodbridge*, 4 McLean, 329.

⁵ *Huddleston v. Garrott*, 3 Humph. 629.

⁶ *Shield v. Batts*, 5 J. J. Marsh, 13; *Gault v. Woodbridge*, 4 McLean, 329.

⁸ *Sumner's Lessee v. Moore*, 2 McLean, 59.

⁹ *Hopping v. Burnam*, 2 G. Greene, 39; *Sumner's Lessee v. Moore*, *supra*.

¹⁰ *Rockhill v. Hanna*, 15 How. 189, 195, 196, 197; *Adams v. Dyer*, 8 Johns. 347, 350; *Waterman v. Haskin*, 11 Ibid. 228

§ 704. And if there be no judgment lien, yet the levy of an execution upon lands creates a lien thereon, and a succession of writs of *venditioni exponas* will preserve the lien, so that a sale on the last one will be good, although the time of the statutory limit of liens created by levy has expired; ¹ for the *venditioni* is not a writ distinct from and independent of an ordinary execution or *fieri facias*, but is in its nature a parcel thereof, and a sale under the latter reaches back to and carries with it the lien of the former, and has relation to the date of the original levy.²

§ 705. And though the proper course is, after levy of a *fieri facias* on lands, and return thereof without sale, to sue out a writ of *venditioni exponas* against the property levied on, yet the plaintiff will not lose the lien of his levy, if instead thereof he causes to be issued an alias *f. fa.* and sells the property thereon.

The latter course, though irregular, is not a waiver of the previous levy.³ For the alias *f. fa.* by relation reaches back to the levy of the original writ, and preserves its lien, so as to bind the property, and prevent priority of another levy made in the interim upon the same property, if the subsequent or alias *f. f.* has issued in due time.⁴

§ 706. Where, by law, the officer holding an execution is required to first exhaust the property, real and personal, of a principal debtor, before proceeding against that of a surety of such debtor, it is held that if, by reason of the principal's death, or incumbrance of his property, it can not be immediately reached by the execution, the amount of the writ may, in such case, be made out of the property of the surety. The creditor is not bound to remove the obstacles that prevent a levy on the principal's property.⁵

§ 707. And so of the levy of an execution against joint debtors, defendants, who are all principals. The officer is not bound to exhaust the personal effects of all of them before proceeding to levy and sell the lands of any one; but unless there is a statutory provision to the contrary, may levy on the lands of any one of such defendants who has no personal property subject to the writ; and so upon the lands of each in turn, who may be found devoid

¹ Neil *v.* Colwell, 66 Penn. St. 216; Wood's *Exr. v. Colwell*, 34 Penn. St. 92.

² Neil *v.* Colwell, *supra*; Hughes *v.* Rees, 4 Meeson & Welsby, 468.

³ Bouton *v.* Lord & Hathaway, 10 Ohio St. 454.

⁴ Brasfield *v.* Whitaker, 4 Hawks, 309.

⁵ Cheatham *v.* Brien, 3 Head, 552.

of personal effect on which to levy. The rule is much more reasonable in cases where all are principals, than where part are sureties, and not the less just.¹

§ 708. And where the rule is, as in Indiana, under the statute, to first offer the rents and profits of land of an execution debtor for sale, for a term not exceeding seven years, at public auction; and if they do not command enough to pay the execution and costs, then, instead of rents and profits, the entire estate and interest of the judgment debtor in the lands is to be sold by virtue of the writ.² But the officer is only required to offer in turn the rents and profits of each parcel of land before selling the fee of such parcel, where several parcels are levied on, and is not required to offer the rents and profits of all the parcels before selling the fee of either.³

§ 709. Property placed by a court of competent jurisdiction in the hands of a receiver, whether rightfully or wrongfully so placed, is in legal custody, and is not subject to execution. "To permit it to be levied and sold," say the Supreme Court of Pennsylvania, "would at once raise a conflict of jurisdiction."⁴

§ 710. In Minnesota, it is held that where a judgment is a lien upon real property, no formal levy of an execution emanating from such judgment is necessary to be made on such property as preliminary to execution sale thereof; and that the provision of the statute of that State, which declares that "until a levy, property is not affected by the execution," applies to a levy upon personal property only.⁵ The courts of that State also hold, that where a levy is required, the sheriff is not bound to return the particular facts constituting the levy; that the general return that he "levied upon" property is sufficient, and can not be disputed, except in a proceeding directly against the officer or his sureties for a false return.⁶

¹ *Starry v. Johnson*, 32 Ind. 438; *Drake v. Murphy*, 42 Ind. 82.

² *Piel v. Watson*, 44 Ind. 447, 448; *Adler v. Sewell*, 29 Ind. 598; Ind. Cent. R. W. Co. v. Bradley, 15 Ind. 23; *Brownfield v. Weight*, 9 Ind. 394; *Thurston v. Barnes*, 10 Ind. 289; *Davis v. Campbell*, 12 Ind. 192.

³ *Adler v. Sewell*, supra.

⁴ *Robinson v. Atlantic & G. W. R. R. Co.*, 66 Penn. St. 160, 162; 2 Story Eq. Jur. Sec. 833, 833a and Note 1.

⁵ *Tullis v. Brawley*, 3 Minn. 277; *Folsom v. Carli*, 5 Minn. 333, 337; *Hutchins v. County Com. of Carver Co.*, 16 Minn. 18; *Bidwell v. Coleman*, 11 Minn. 78; *Lockwood v. Bigelow*, 11 Minn. 113.

⁶ *Tullis v. Brawley*, 3 Minn. 277; *Rohrer v. Turrill*, 4 Minn. 407; *Folsom v.*

§ 711. A levy grossly excessive will be deemed fraudulent, and a sale thereon will be set aside; and where, on such levy, a sales of lands *en masse* is made, without its appearing that the land was first offered in less parcels, the inference will not arise that such was the course pursued by the officer, but rather the reverse thereof.¹ Thus a levy of property of the value of eight hundred dollars for a claim of twenty-one dollars is grossly excessive and oppressive. In the language of the court, in *Cook v. Jenkins*,² it is "a fraud in fact upon defendant," and "we know of no principles of equity that will sustain proceedings which work such gross injustice and oppression, except in cases where innocent parties claim rights under them."

§ 712. When the property levied on is exhausted by sale on a *venditioni*, then the proper further remedy, if satisfaction is not full, is to issue another *fit. fa.* and make further levy. A second *venditioni* without an unsatisfied levy to rest upon, is not a valid writ, and sale on it is void.

In making title under sale on a *venditioni exponas*, the writ must be produced or accounted for,³ and so in sales on ordinary writs of execution.⁴

If the writs follow each other in regular order, the omission of the clerk to characterize them as *alias*, *pluries*, and so on, in order, does not affect them or the sale.⁵ Nor will a mistake in naming of them.⁶

§ 713. A levy on execution of realty, which is not only excessive, but is so made as to run a dividing line through valuable buildings in such a manner as to greatly depreciate or destroy their value, is fraudulent and void.⁷

§ 714. For an excessive levy the remedy is by motion in the same court whence the writ issues. Equity will not interpose.⁸ There is also a remedy at law, by action, if the levy be of personalty. It may amount to a trespass.

Carli, 5 Minn. 333; *Hutchins v. County Com. of Carver Co.*, 16 Minn. 13; *Frasier v. Williams*, 15 Minn. 288; *Bidwell v. Coleman*, 11 Minn. 78.

¹ *Cook v. Jenkins*, 30 Iowa, 452.

² 30 Iowa, 452.

³ *Simpson v. Hiatt*, 13 Ired. L. 470.

⁴ *Riddle v. Bush*, 27 Tex. 675.

⁵ *Graves v. Hall*, 13 Tex. 379.

⁶ *Snydor v. Roberts*, 18 Tex. 598.

⁷ *Wallace v. Trustees of Atlanta Med. College*, 52 Geo. 164.

⁸ *Palmer v. Gardiner*, 77 Ill. 143, 150.

If the levy be excessive and on lands, then equity refuses to interfere, for the additional reason that it can work no injury, as the officer can only sell enough thereof to satisfy the writ, (if capable of subdivision, and if not so capable, then the levy is not excessive,) and the levy itself is thereby exhausted, and in the meantime does not change the ownership or possession of the property, which is in excess of that necessary to satisfy the execution and costs.¹

§ 715. Where, instead of completing the execution by a sale and deed thereon, the proceeding is by an *extent*, and title is in that way conferred, in real property levied on, it is a valid levy when made upon one-fifth of an undivided property, of which fifth the debtor is alleged to be seized.²

But not so in regard to a levy of four-fifths of the debtor's *interest in common*, without stating what that interest is. In the latter case the levy would be void for uncertainty.³ So, also, is a levy void if it does not appear that the debtor chose one of the appraisers or declined so to do, where the law requires an appraisement and gives the debtor the privilege of choosing one of the appraisers.⁴

IX. THE NOTICE OF SALE AND RETURN.

§ 716. "The purchaser depends on the judgment, the levy and the deed. All other questions are between the parties to the judgment and the officer selling."⁵

It matters not, then, as respects the rights of a *bona fide* purchaser at sheriff's sale, whether there be a legal notice of the

¹ Palmer *v.* Gardiner, 77 Ill. 143, 150.

² Morse *v.* Sleeper, 58 Maine, 329.

³ *Ibid.*

⁴ Morse *v.* Sleeper, *supra*. (And where imprisonment for debt is allowed, a levy made on property while the defendant is in custody on the writ, is void. Clement *v.* Garland, 53 Maine, 427. For by the taking of the body the writ is presumed to be satisfied.) Ware *v.* Barker, 49 Maine, 358.

⁵ Wheaton *v.* Sexton, 4 Wheat. 503; Brooks *v.* Rooney, 11 Geo. 423; Sullivan *v.* Hearnden, 11 Geo. 294; Jackson *v.* Spink, 59 Ill. 404; Phillips *v.* Coffee, 17 Ill. 154; Doe *v.* Heath, 7 Blackf. 154; Kinney *v.* Knoebel, 47 Ill. 417; Stribbling *v.* Prettyman, 57 Ill. 372; Woodley *v.* Gilliam, 67 N. C. 237; Riddle *v.* Bush, 27 Tex. 675.

sale,¹ or a return of the officer selling.² And though the purchaser relies on the judgment execution, the levy and the deed, yet when the purchaser at sheriff's sale shows an authorized execution and deed, a correct levy and notice is presumed. A judgment, execution and deed from the sheriff are sufficient to support the title of a purchaser, without proof of a levy, though the return be incorrect, or there be no return.³ The purchaser is not bound to see that the sheriff makes a return.⁴

§ 717. If after levy and notice of sale on one writ of execution another writ be received by the officer against the same defendant, he can only sell, if no further notice be given, on the first writ. The certificate of such sale should refer to but the one writ, and however the proceeds of sale may be applied, yet the whole amount thereof must be mentioned as the consideration in the certificate of sale, and in the deed when given.⁵

§ 718. As a general principle the purchaser will not be prejudiced by omission of the officer to return and file a certificate of sale, under the statute. The requirements is only directory.⁶

§ 719. But in Rhode Island the ruling is different in regard to the necessity of a return and the manner of sale being shown thereby. It is there held, as recently as 1872, that in a sale of

¹ Lawrence *v.* Speed, 2 Bibb, 401; Whitaker *v.* Sumner, 7 Pick. 552; Wheaton *v.* Sexton, 4 Wheat. 508, 506; McEntire *v.* Durham, 7 Ired, L. 151; Maddox *v.* Sullivan, 2 Rich. Eq. 4; Natchez *v.* Minor, 10 S. & M. 246; Kilby *v.* Haggins, 3 J. J. Marsh. 208; Brooks *v.* Rooney, 11 Geo. 423; Draper *v.* Bryson, 17 Mo. 71; Phillips *v.* Coffee, 17 Ill. 154.

² Wheaton *v.* Sexton, 4 Wheat. 503; Hopping *v.* Burnam, 2 G. Greene, 39, 44; Brooks *v.* Rooney, 11 Geo. 423, 425; Webber *v.* Cox, 6 T. B. Mon. 110; State *v.* Salyers, 19 Ind. 432; Phillips *v.* Coffee, 17 Ill. 154; Wood *v.* Morehouse, 45 N. Y. 368, 369. (And by the case last cited, the execution plaintiff, if the purchaser, is to be regarded as a *bona fide* purchaser, unless implicated in the irregularities.)

³ Brooks *v.* Rooney, 11 Geo. 423; Hopping *v.* Burnam, 2 G. Greene, 39, 44; Evans *v.* Davis, 3 B. Mon. 344; McEntire *v.* Durham, 7 Ired, L. 151; Jackson *v.* Young, 5 Cow. 269; Phillips *v.* Coffee, 17 Ill. 154.

⁴ State *v.* Salyers, 19 Ind. 432; Stribbling *v.* Prettyman, 57 Ill. 372; Jackson *v.* Spinks, 59 Ill. 404; Phillips *v.* Coffee, 17 Ill. 154; Doe *v.* Heath, 7 Blackf. 154.

⁵ Mascraft *v.* Van Antwerp, 3 Cow. 334.

⁶ Jackson *v.* Young, 5 Cow. 269, 270. By the statute, in New York, the certificate of the sheriff's sale is required to be filed in the clerk's office by the sheriff. In the case here cited it was claimed that omission to file the certificate voided the sale; but the court held the statute to be directory only.

lands on execution there must be a *return*, and the *return* must show affirmatively a compliance with the statute in making the sale. That a defect of title in that respect is incurable, inasmuch as the power of the officer being statutory can only be effectually exercised in the manner prescribed by the statute, and that this conformity can be shown only by the return of the officer.¹

Thus the courts of Rhode Island require the same certainty and evidence of compliance with the statute, in a sale of real estate, as the New England rule in reference to an *extent*, and that this appear in like manner by the return.

§ 720. The return of the officer making execution sale, of real property in Indiana, is evidence as between parties and privies, and as against himself, so far as regards the official acts and duties to be performed by him;² but not as to matters foreign thereto, and as to strangers.³ The former are unable to impeach the return in collateral proceedings, and may only do so, by proceeding gotten up directly for that purpose.⁴ Against the latter, however—that is strangers to the original proceedings—such return is only *prima facie* evidence of its own truthfulness, and may be contested in a collateral enquiry.⁵

§ 721. And so, where the return of the officer shows the appraisement law to have been complied with, and the sale to have been made for more than two-thirds of the appraised value as required by law, it will not, on a bill filed to set the sale aside, be intended on demurrer thereto, that the sale was for less than two-thirds the value *exclusive of liens*, when the bill does not so expressly charge; but the return of the sheriff in that respect will be regarded as true, and as importing *exclusive of liens*, as the law requires.⁶

§ 722. But, though it be the law that, the officer's return of

¹ Wilcox *v.* Emerson, 10 R. I. 270.

² Splahn *v.* Gillespie, 48 Ind. 397; Hill *v.* Kling, 4 Ohio, 135; Lindley *v.* Kelley, 42 Ind. 294.

³ Splahn *v.* Gillespie, 48 Ind. 397.

⁴ Ibid.

⁵ Ibid.

⁶ Brown *v.* Butters, 40 Iowa, 544. In this case, the Supreme Court of Iowa re-affirm the doctrine of Maple *v.* Nelson, 31 Iowa, 322. See *supra* in the text, and again assert the policy of the law to be to uphold execution sales, as against irregularities not involving a defeat of power in the officer, and citing "Hill *v.* Baker, 32 Iowa, 302; Davis *v.* Spaulding, 36 Iowa, 610; Cavender *v.* The Heirs of Smith, 1 Iowa, 306."

an execution shall be taken as true, until the contrary is shown, concerning those matters required by law to be by him returned, yet such is not the case, in reference to the return by him of extraneous circumstances or facts. The return of these latter, is not even *prima facie* evidence of the truth thereof as between the parties to the proceeding, or third parties, nor in the officer's own favor. As, for instance, the return of an officer on a writ of execution, that proceedings were stopped thereon, by order of the plaintiff therein, is not even *prima facie* evidence, as between the plaintiff in the writ and a surety or sureties seeking relief from liability by reason of such supposed order; nor in a proceeding against the officer himself.¹

X. THE SALE—BY WHOM TO BE MADE.

§ 723. If the direction of the writ is simply to the sheriff or officer as such, then it may be executed by himself or by his deputy; but if directed to the officer by his personal name, as well as by his title, then he must execute it himself in person.² In the case cited from 2d Washington, the court say: "This is a writ directed to the sheriff, which means as well the deputy as the high sheriff. It is a writ, and all writs may be executed by a deputy sheriff. It is not a judicial act; it is not a case excepted from the general authority given to deputy sheriffs, and, therefore, I can see no reason why he may not execute the inquisition."³

In the same case the court lay down the general rule to be, in the absence of statutory regulation to the contrary, that where the "process" is directed to the sheriff generally, and not by his name, the high sheriff not being required by the command of the writ to go in person, he may act by deputy.⁴ The term "process" used by the court is a comprehensive term, broad enough to cover cases of executions generally. The execution of an *elegit* is referred to by the court as within the powers of the deputy, which, as to the exercise of power, very nearly cor-

¹ Shannon *v.* McMullin, 25 Gratt. 211; (1874.)

² 8 Bac. Abt., Undersheriff, 676; Wroe *v.* Harris, 2 Wash. (Va.) 126; Tillotson *v.* Cheetham, 2 Johns. 63.

³ Wroe *v.* Harris, supra; Tillotson *v.* Cheetham, supra.

⁴ Wroe *v.* Harris, supra; Tillotson *v.* Cheetham, supra.

responds with the act of selling on execution, where the latter practice prevails.

§ 724. In Tennessee, however, by an early decision, it is held that the deputy may not only sell where he levies, but may convey the land to the purchaser by deed, as deputy, without mention of the sheriff; but that to support the deed the deputation of the sheriff to the deputy must be shown;¹ yet, that in questions arising between third parties such showing need not be of a deputation by deed.

§ 725. And a sale, on a judgment of foreclosure of a mortgage, and execution thereon, in Kansas, though conducted at the biddings by the deputy, is held to be valid, when confirmed by the court, and the deed executed by the high sheriff, or principal sheriff himself.² And it there ruled that a mere reference to the execution in the deed, by such description as identifies it, is a sufficient recital thereof, and the word "recite" in the statute does not mean to insert the writ *verbatim*.³

§ 726. A sheriff can not sell on an execution in which he is plaintiff, nor in his own behalf, where he has purchased the benefit of the writ.⁴

§ 727. Under the act of Congress of 1789, it is held by the United States Supreme Court, that a United States marshal may proceed to sell lands on execution after his removal from office, if the writ was in his hands at the time of his removal, and that the sale will be valid, if in other respects unexceptionable. The writ, in the particular case referred to, was a *venditioni exponas* and was in the possession of the officer at the time of his removal.

The act referred to reads in this respect as follows: "Every marshal or his deputy, when removed from office, or when the term for which the marshal is appointed shall expire, shall have power notwithstanding to execute all such precepts as may be in their hands, respectively, at the time of such removal or expiration of office," etc., and it is held by the United States Supreme Court, in the same case, that the act of May 7th, 1800, does not repeal the clause in that of 1789, above recited; that in respect

¹ Glasgow's Lessee v. Smith, 1 Overton, 143.

² Ogden v. Walters, 12 Kansas, 282.

³ Ibid.

⁴ Riner v. Stacey, 8 Humph. 288; Chambers v. Thomas, 3 A. K. Marsh. 536; May v. Walters, 2 McCord, L. 470.

to the same subject it is merely cumulative in the remedy afforded.¹

The case of *Miner's Lessee v. Cassat*² was an action of ejectment involving the validity of the marshal's sale in the case previously cited of *Doolittle v. Bryan*, as to the power of the marshal to complete execution of a writ in his hands after removal from office. The lower court of Ohio, conforming its decision to that of the United States Supreme Court, sustained the power of the ex-marshall to sell, and held the title under the marshal's sale valid in the action of ejectment. The Supreme Court of Ohio affirmed the decision of the court below, thereby holding the ruling of the United States Supreme Court on the subject conclusive.

§ 728. By the constitution of our respective State and Federal judiciaries, the United States Court is the proper and controlling tribunal to decide upon the effect of the enforcement of its own process. Hence its decision was rightly deferred to by the State court.

XI. HOW TO BE MADE.

§ 729. Execution sales are to be made at public auction,³ for money in hand,⁴ and to the highest unconditional bidder.⁵ They must be made by the officer himself, or by his general deputy, as we have seen under the last preceding head.

§ 730. When the land is divided into several separate parcels, though one and the same tract, the several tracts can not be sold together as in a body, but must be sold separately, with suitable identity of the several lots. If sold in the aggregate, the court, on motion, will set the sale aside. "Sales in mass, of real estate held in parcels, are not to be countenanced or tolerated."⁶

¹ *Doolittle's Lessee v. Bryan*, 14 How. 563; *Miner's Lessee v. Cassat*, 2 Ohio St. 198.

² 2 Ohio St. 198.

³ 3 Bouvier, 581.

⁴ *Noy, Max. Ch. 42*; *Mumford v. Armstrong*, 4 Cow. 553; *Griffin v. Thompson*, 2 How. 244; *Swope v. Ardery*, 5 Ind. 213; *Williamson v. Berry*, 8 How. 544; *Hutchmacher v. Harris*, 38 Penn. St. 498; *Bigley v. Risher*, 63 Penn. St. 152; *Sauer v. Steinbauer*, 14 Wis. 70.

⁵ *Swope v. Ardery*, 5 Ind. 213.

⁶ *Jackson v. Newton*, 18 Johns. 355; *McLaughlin v. Scott*, 1 Bin. 61; *Wheeler v. Kennedy*, 1 Ala. 292; *Adams v. Keiser*, 7 Dana, 208; *Garrett v. Moss*, 20 Ill. 549; *Tyler v. Wilkerson*, 27 Ind. 450; *Phelps v. Conover*, 25 Ill. 309; *Meeker*

§ 731. And so, if the tract be an entirety, it is the duty of the officer to sell in parcels, if susceptible of division, unless the sale of the whole is necessary to satisfy the writ.¹

§ 732. Though it is the duty of the officer to sell property in the exercise of a fair discretion, and to the best advantage, so as to make the debt demanded by the execution without unnecessary sacrifice of the debtor's property;² yet, having levied on lands which were then but one body, but which, after levy and before sale, are divided by the debtor into several lots, the sheriff is "not bound," say the court, "to sell the lots separately," according to such subdivision. He may exercise in respect thereto an honest discretion.³

§ 733. In New York it is held that where premises are owned by several execution defendants in the same execution, their separate interests may be sold together at once, unless some one of them, being entitled to redeem from the sale, require the separate interests to be sold separately. If so required, it must be so sold, under the New York statute.⁴

§ 734. In *Hewson v. Deygert*,⁵ it is held by the Supreme Court of New York, that "The proper course, both on sales of real and personal property (on execution,) is to sell only so much of the property charged as will probably satisfy the execution, and which can conveniently and reasonably be sold separately. A party who sells under a power is not bound to sell at once all the property bound by the power, and in many cases it would be an act of great oppression." It was also held, in the same case, that if he sells the whole to satisfy a part of the charge upon it, that he can not sell it again or a second time to satisfy newly matured and growing installments, unless it be redeemed by the execution debtor.

¹ Evans, 25 Ill. 322; Piel *v.* Brayer, 30 Ind. 332; Winters *v.* Burford, 6 Cold. 328. In Indiana, selling in parcels is required by statute, and is alike applicable to mortgage sales or sales on execution. 30 Ind. 332; Woodhull *v.* Neafie, 1 Green's Ch. 409; Rinsarson *v.* Garrett, 1 C. E. Green's, 31.

² Kinney *v.* Knoebel, 51 Ill. 112, 121; Berry *v.* Griffith, 2 H. & G. 387; Hewson *v.* Deygert, 8 Johns. 333; Winters *v.* Burford, 6 Cold. 328.

² Kiser *v.* Ruddick, 8 Blackf. 382, 383; McLean Bank *v.* Flagg, 31 Ill. 290; Phelps *v.* Cowen, 25 Ill. 309.

³ Kiser *v.* Ruddick, 8 Blackf. 382, 383.

⁴ Neilson *v.* Neilson, 5 Barb. 565.

⁵ 8 Johns. 333, 335; Wheeler *v.* Kennedy, 1 Ala. 292; Meeker *v.* Evans, 25 Ill. 322; Day *v.* Graham, 6 Ill. 435.

§ 735. To avoid exhausting the lien by one sale only, the sale should be of only so much of the property as is requisite to satisfy the amount due. But the court will not interfere by injunction to prevent a second sale. The party having title has his remedy, if injured, and no execution sale of the realty will affect the title if the lands be not subject to sale on execution.¹

§ 736. In some of the States it is held that if more be sold on execution than will satisfy the writ, the sale is void.² But if the excess be very small, and results from a mere mistake in calculation, or other unintentional circumstance, the sale will not be set aside.³

§ 737. No bid may be received but what is unconditional; the officer himself, and not the bidders, is to fix the terms of sale.⁴

§ 738. The officer selling has power to adjourn the sale, and to sell on the day to which it is adjourned. On the subject of adjournment he has a sound discretion, which must be exercised fairly, and as in his judgment is best for all the parties concerned.⁵

§ 739. The case of *Wolfe v. Van Metre*⁶ involved the validity of an adjournment made by the attorney of the execution plaintiff. The sheriff levied an execution on land, and gave notice of sale, but from some cause did not attend at the time and place of intended sale. Foreseeing his non-attendance he authorized the attorney of the execution plaintiff to adjourn the sale. The return showed that the sale was adjourned by such attorney for

¹ *Hewson v. Deygert*, 8 Johns. 333, 335.

² *Patterson v. Carneal*, 3 A. K. Marsh, 618; *Pepper v. Commonwealth*, 6 T. B. Mon. (S. C.) 26, 30; *Davidson v. McMurtry*, 2 J. J. Marsh, 68; *Carlile v. Carlile*, 7 J. J. Marsh, 625; *Stover v. Boswell*, 3 Dana, 235; *Addison v. Crow*, 5 Dana, 277; *Adams v. Keiser*, 7 Dana, 209; *Isaacs v. Gearheart*, 12 B. Mon. 231; *Gearheart v. Tharp*, 9 B. Mon. 35.

³ *Southard v. Pope*, 9 B. Mon. 263; *Adams v. Keiser*, 7 Dana, 208; *Morrison v. Bruce*, 9 Dana, 211.

⁴ *Swope v. Ardery*, 5 Ind. 215; *Chapman v. Harwood*, 8 Blackf. 82.

⁵ *Swortzell v. Martin*, 16 Iowa, 519; *Kelly v. Creen*, 63 Penn. St. 299; *Phelps v. Conover*, 25 Ill. 309; *Tinkom v. Purdy*, 5 Johns. 346. But see to the contrary *Patten v. Stewart*, 26 Ind. 395. This adjournment, however, was made after the sale was enjoined. When the injunction was removed notice anew became necessary. In Louisiana, however, the power to adjourn was denied by the settled doctrine in the courts of that State. *Montgomery v. Barrow*, 19 La. Ann. 169. Nor can plaintiff's attorney adjourn the sale by authority of the officer. *Wolf v. Van Metre*, 27 Iowa, 348. The officer may adjourn the sale in North Carolina. *Wade v. Saunders*, 70 N. C. 270; *Doe v. Bradley*, 3 Hawks, 16.

⁶ 27 Iowa, 348.

want of bidders. It was adjourned for two days. Sale was then made under the adjournment by the sheriff. The Supreme Court of Iowa, BECK, Justice, held the sale to be invalid. That court say: "To permit the sheriff to authorize the attorney of either party to discharge the duty for him, would open a wide door to fraud and abuse." And that it was "a gross irregularity for the sheriff to entrust his business with the plaintiff's attorney."

§ 740. Executions are to be enforced and satisfied in their order of priority. In Indiana, it is held that when different writs, enforceable under different laws, are held by the officer at one and the same time against the same defendant, each shall be enforced according to its legal effect and in the order of priority.

The Supreme Court of Indiana, in *Harrison v. Stipp*, say: "Where a sheriff has several executions in his hands, governed by different laws as to terms upon which the property levied upon is required to be sold, it is evident that he can not possibly comply, at a single sale, with the requisitions of each execution. If the property is divisible, however, he may sell under each a sufficient portion for its satisfaction. It would seem that in such case the obvious course, and the only one by which the law can be complied with is, to commence with the execution in his hands first to be satisfied, and sell enough under the law of the contract by which it is governed to make the sum demanded by it, and then to sell under the others, in their order, in the same way, until all are satisfied, or the property is exhausted. But when the property is not susceptible of a division this can not be done." In the latter case, the same court hold, that "the sheriff should ordinarily proceed to sell first upon the execution upon the oldest judgment, or for the payment of the debt first to be satisfied out of the proceeds. He would thus comply with the law as far as it would be in his power to do so, and the least injury would be likely to result to the rights of the various parties." And the court further hold that if the property be appraisable under the older execution or lien, then sale under the appraisement law as for the whole, where the property is indivisible, is legal if made in proper conformity to such law of appraisement. But if not so made, that the sale will be set aside.¹

§ 741. In South Carolina the rule is to satisfy the writs, in the order of priority in which they are received for execution by

¹ *Harrison v. Stipp*, 8 Blackf. 455. See also *Bronson v. Kinzie*, 1 How. 311.

the officer, if there be no liens on which they rest; so, that though the levy and sale be on a junior writ, it will work a preference of application as to a senior writ, or one first in point of time in the hands of the officer.¹

§ 742. A sale of lands upon three writs of execution, at one and the same time, is a sale upon each, and as much a sale upon each one as upon either or all.² The waiving by the defendant of any claim of exemption from sale as to one of the writs, or of an appraisement, does not deprive him of that right in respect to other writs and levies junior thereto. If there be at the same time a writ in the hands of the officer issued on a senior judgment which is a lien, then, whether the claim of exemption be made or not as to it, when the sale upon the intermediate one or upon the whole at once is made, whereby the sale, as to the intermediate one, is valid, the senior judgment and execution will be entitled to be first satisfied out of the proceeds, as the debtor can not postpone this right by consenting to sale on the one secondary as a lien in point of time. The debtor having acquiesced in the sale as to one of the writs, the law will apply the proceeds where in point of priority it belongs.³

§ 743. If not prohibited by the constitution, the statute regulating execution sales may provide for the making of such sales on a credit, taking bonds for the purchase money, and such provision will be constitutional.⁴

But such bonds do not work an actual satisfaction of the writ until paid.⁵ They are rather in the nature of obligations for the forthcoming of the purchase money.⁶ The execution creditor is not bound to receive them, but may do so if he will in satisfaction of the execution, by indorsing satisfaction on the writ when he receives them, and such satisfaction will be effectual as satisfaction of the writ and judgment.⁷

§ 744. A sheriff selling lands on a writ of execution, and tendering to the purchaser the legal written evidence of such sale, required by the statute, may maintain against the purchaser

¹ *Lynch v. Hanahan*, 9 Rich. L. 186.

² *McCreary's Appeal*, 74 Penn. St. 194.

³ *Ibid.*

⁴ *Garland v. Brown's Admr.*, 23 Gratt. 173.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

an action for the purchase money, if he refuses to pay the same. The officer and not the plaintiff in the writ is the one to bring the suit. The plaintiff has no right to the money until it comes to the officer's hands, whom the law requires to make it and take it into his own possession in satisfaction of the execution.¹

In such case the usual certificate, in writing, made out by the sheriff, is all the written evidence required to avoid the statute of frauds.²

§ 745. It is not in itself an objection to a bid at a sheriff's sale of lands on execution that it is made by letter, provided there be no unfairness about it, and it be publicly cried as bids usually are. If there be no advance on a bid so offered, the officer will be justified in selling on it, as he would be on selling on a bid orally made, all other circumstances being the same. "But the creditor has a right to insist on all the forms." If, however, the bid be not publicly cried at the appointed place of sale, but be received and privately noted in the house, instead of at the door of the place appointed, or there be other evidences of collusion or unfairness, the sale will be set aside.³ And if in such case the return on the execution be of a sale to the person so bidding, and the certificate of purchase be given to and in the name of another and different person, the certificate will be inoperative and void. In the language of the Supreme Court of Illinois, "there must be entire conformity in all these proceedings, in the return, the certificate, and the deed, and if they do not possess it they will be invalid. *Davis v. McVickers*, 11 Ill. 327." And that issuing the certificate to a different person than the supposed purchaser was a void act under Chap. 57, Sec. 12, R. S., 1845.⁴

§ 746. It is uniformly held, in Illinois, that where lands or lots which could be divided and sold in parcels are sold in

¹ *Armstrong v. Vroman*, 11 Minn. 220; *Gaskell v. Morris*, 7 W. & S. 39; *Adams v. Adams*, 4 Watts, 160; *Chappell v. Dann*, 21 Barb. 24; *Crocker on Sheriffs*, Sec. 487.

² *Armstrong v. Vroman*, *supra*.

³ *Dickerman v. Burgess*, 20 Ill. 266. In this case the court say: "We do not mean to be understood as objecting to receiving a bid by letter, but the officer must cry the bid, and if there be no advance on it he would be justified in selling at the bid."

⁴ *Dickerman v. Burgess*, 20 Ill. 280; *Davis v. McVickers*, 11 Ill. 327.

a mass, such sale is irregular and is subject to be set aside.¹ The case of *Greenup v. Stoker*² is adjudged to be no exception to the rule, for in that case the sale was of but a single quarter section, and it was not made to appear that it could have been advantageously divided, or that any subdivision of it would have satisfied the writ.³

§ 747. When there is a body of land levied on, which is composed of several contiguous tracts, each tract is to be offered separately, the officer using his best judgment as to subdividing into lots; failing thus to sell, he is to add the subdivisions together, one by one, and offer them thus unitedly; and if not sold in this manner, then the whole may be sold together, on a reasonable bid, the particulars of which is to be reported in the officer's return.⁴

§ 748. So, when the lands are situated in different townships and ranges, or the tracts are otherwise disconnected, they are to be offered severally and separately, each one in like manner as above, first in smaller subdivisions, as forties, and then in larger, as eighties, and finally each tract separately, as a whole, if not disposed of in parcels; and if there is a reasonable bid, the same on each tract that is to be sold in a body in this manner, and so on in like manner each tract, until the sum required be raised. The creditor may insist on a sale, and if sold under value, the debtor finds relief in the redemption laws.⁵

§ 749. In Minnesota, the statutory provision requiring land to be sold in parcels, on execution sale, is held to be merely directory, and a sale in the aggregate being otherwise unobjectionable, is valid. The injured party is left to his remedy against the officer selling.⁶

§ 750. In Wisconsin, the sale in such case is voidable, and may be set aside at the option of those in interest.⁷

§ 751. In California, a sale in mass was held valid, though

¹ *Phelps v. Conover*, 25 Ill. 313; *Day v. Grayham*, 6 Ill. 435 and 9 Ill. 389; *Ross v. Mead*, 10 Ill. 171; *Stewart v. Croes*, 10 Ill. 442.

² 12 Ill. 24.

³ *Phelps v. Conover*, 25 Ill. 309, 313.

⁴ *Ibid.*; *Van Valkenburg v. Trustees of Schools*, 66 Ill. 103.

⁵ *Ibid.*

⁶ *Tillman v. Jackson*, 1 Minn. 183.

⁷ *Raymond v. Pauli*, 21 Wis. 531, 534; *Bunker v. Rand*, 19 Wis. 258.

the general ruling there is to the contrary. There were several adjoining parcels sold together. The sheriff and purchaser being ignorant of the subdivisions at the time of sale, and the conduct of the defendant being such as tended to mislead the officers; he having surrendered the land to the sheriff without informing him that there existed any subdivisions, and the sale was made according to the description which he furnished.¹ But *quære*, if it would not be set aside, if sold below value, on the application of other creditors, in case the debtor has no other property?

§ 752. The ruling in Indiana, as to place of sale by a United States marshal, is, that under the State statute adopted by the Federal Court, such sales are to be made in the county where the lands which are sold lie.² This decision, with the one in the preceding section, are by the respective State courts of those States wherein the questions arose in collateral proceedings.

§ 753. In Tennessee the rule is, in selling lands on execution, that the sale be made, when practicable, in parcels, so as not only to obtain the required sum for the smallest amount of property, but also to the better enable the judgment debtor to redeem when the price of each lot is thus separately fixed. If sale be made in violation of the above principles, it is voidable, though not void, and will be set aside by the court on the proper application of those interested, including the holders of other unsatisfied judgments against the same judgment debtor.³

§ 754. If different parcels be sold *en masse*, the delivery of the deed to the purchaser, on application of the execution debtor, may be arrested by injunction; but on terms that he pay off the execution and costs, with interest.⁴

§ 755. Sales may be made on several executions at once. "It can do no harm (say the court,) as the sheriff sells so much as will satisfy all." If the amount bid for the whole is more than will satisfy all the writs, then, little by little, the quantity

¹ Smith *v.* Randall, 6 Cal. 47. The court lay down the general rule as follows, TERRY, Justice: "As a general rule the sales in mass of land consisting of separate lots are not tolerated or countenanced in courts of justice. But this rule should not be extended so as to allow a debtor, by misleading the officer with a false description, or by withholding information, to invalidate a sale under execution, made in good faith, in the entire absence of fraud." (P. 51.)

² Jenners *v.* Doe, 9 Ind. 461.

³ Winters *v.* Burford, 6 Cold. 328.

⁴ Ballance *v.* Loomiss, 22 Ill. 82.

of land may be reduced by proper bidding. Therefore the officer can combine the writs, and do equal justice to all the parties in interest. He can afterward apply the proceeds as the law may require. So if part of the sale is for cash, and part on credit, some of the writs being on judgments and some on replevin bonds, it only requires that the terms and proportion of cash and credit, respectively, be made known to the bidders.¹

§ 756. In Indiana it is provided by statute, that "if the estate shall consist of several lots, tracts and parcels, each shall be offered separately; and no more of any real estate shall be offered for sale than shall be necessary to satisfy the execution, unless the same shall not be susceptible of division."

The Supreme Court of that State hold that it is well settled that if the sheriff, in violation of such statute, offer and sell several distinct tracts or parcels of land in one body, the sale is void; and that the provisions of the statute apply as well to sales on foreclosure of mortgages as to sales on ordinary execution.² And when the sheriff's return and record showed that more than one parcel were sold as an entirety, the sale was held void in the hands of a third party claiming under the execution purchaser, who was also plaintiff in execution.³

If the land consist of several tracts or parcels, it is the imperative duty of the sheriff (say the court,) under such statute, to offer the parcels separately; and if but a single tract or body, and is susceptible of division without injury, and the sale of the whole is not required to satisfy the execution, he is to divide it, and offer at one time only so much of it as may be necessary to satisfy the judgment, interest and costs.⁴

§ 757. But although the officer holding the execution is by statute in Indiana to sell the lands of the execution debtor in parcels, if they be in separate parcels;⁵ and if not in parcels, yet to be separated and sold in parcels if susceptible of division, he must sell a necessary portion only; yet if they be not susceptible of division to advantage, the sheriff may then sell the whole at

¹ *Locke v. Coleman*, 4 T. B. Mon. 316; *Southard v. Pope*, 9 B. Mon. 263.

² *Piel v. Brayer*, 30 Ind. 332, 339; *Sherry v. Nick of the Woods*, 1 Ind. 575; *Reed v. Diven*, 7 Ind. 189; *Banks v. Bales*, 16 Ind. 423; *Tyler v. Wilkerson*, 27 Ind. 450.

³ *Piel v. Brayer*, 30 Ind. 332, 339.

⁴ *Ibid.*

⁵ *Wright v. Yetts*, 30 Ind. 185; *Piel v. Brayer*, *supra*.

once, in the exercise of an honest discretion, and his action in that respect will be valid if clear of abuse, notwithstanding the propriety thereof may be the subject of a candid difference of opinion.¹ If he sell *separate* parcels thus—that is together—it is a violation of the statute of that State, which requires sales of parcels to be made in parcels and no more to be sold than will satisfy the writ; and the sale will for such violation be void.

§ 758. And upon a like principle, where, as in Maine, the statute allows execution sales to be made of equities of redemption in real property, it is held that the sale of two equities together is absolutely *invalid* when sold for an entire sum, and as an entirety, inasmuch as it puts it out of the power of the debtor to redeem from such sale, either the one or the other, without redeeming both.² And that a purchaser might be willing to buy one equity and redeem the mortgage on that when not willing or able to buy both, and redeem from both mortgages; all which tends to prevent biddings and to lessen the number of purchasers at such sales, to the evident injury of the debtor.³ So, if the equity of redemption of one parcel of land is mortgaged in common with another tract, to secure a debt as an entirety, then the sale of one equity only, on execution, is void, since it is not practicable to ascertain any certain amount to be paid in redeeming, and therefore no redemption can be made.⁴

§ 759. And so, notice of execution sale on a day of the month which comes on Sunday, is an insufficient notice, since a sale on Sunday is illegal, and therefore such notice is invalid.⁵

Thus when an equity of redemption in lands was advertised by the officer to be sold on a day of the month which came on Sunday, the sale, if it had been made on that day, would have been void.⁶ So if the sale is made the day before, and return of the facts is made showing notice for one day, and sale on another.

¹ Wright *v.* Yetts, 30 Ind. 185; Piel *v.* Brayer, 30 Ind. 332.

² Smith *v.* Dow, 51 Maine, 21; Fletcher *v.* Stone, 3 Pick. 250.

³ Smith *v.* Dow, *supra*.

⁴ Webster *v.* Foster, 15 Gray, 31; Johnson *v.* Stevens, 7 Cush. 431, 435; Pease *v.* Bancroft, 5 Met. 93; Platt *v.* Squire, 5 Cush. 551; Gibson *v.* Crehore, 5 Pick. 152.

⁵ Thayer *v.* Roberts, 44 Maine, 247; Wellman *v.* Lawrence, 15 Mass. 326.

⁶ The same cases as above.

¹ Thayer *v.* Roberts, *supra*.

But where under such notice the sale is made on Saturday, the day before, and the officer falsely return the writ as having given notice for sale on Saturday and sold on Saturday, then the sale is so far conclusive, as to vest the equity sold in the purchaser, *prima facie*, and prevent a taking of the same equity on a junior process, and therefore the plaintiff in a subsequent attachment, thus losing his right to take the same equity of redemption by reason of the false return, may maintain an action against the officer for the value of such equity, not to exceed his claim and costs, if the same is otherwise lost for want of property on which to levy.¹

§ 760. And although the sales of lands, *en masse*, of several adjoining tracts are sometimes sustained on collaterally coming in question, as in ejectment, involving title under the sheriff's deed, where no objection had been made to that method of selling, on the return of the writ, or steps taken to set aside the sale, yet the practice is a bad one and will not be countenanced, if objected to by timely objection.²

§ 761. Between two liens, the senior of which covers property not covered by the junior, as well as that covered by the junior, equity compels the senior lien to exhaust first that property not covered by the junior.³

§ 762. But not so, if one lien is surety for the other.⁴ In the latter case, the principal's estate and interests are first liable.⁵

§ 763. If the lien is on the wife's property and it is sold, any surplus of funds belongs to the wife.⁶ And property bought with such proceeds is not liable to execution for the husband's debt.⁷

§ 764. Though, as a general rule, the sale on execution in Georgia, is to be of the property, in the inverse order of its conveyance away, by the debtor,⁸ yet such is not the rule, where the execution emanates from a judgment which is a lien on

¹ Thayer *v.* Roberts, 44 Maine, 247.

² Doe *v.* Hedges, 3 Hawks, 51; Doe *v.* Twitty, 3 Hawks, 44.

³ Watson *v.* Bane, 7 Md. 117; State Bank at N. Brunswick *v.* Receivers of Same, 2 Green. Ch. 266.

⁴ Johns *v.* Reardon, 11 Md. 465.

⁵ Ibid.; Woollen *v.* Hillen, 9 Gill, 85.

⁶ Johns *v.* Reardon, *supra*.

⁷ Ibid.

⁸ Barden *v.* Grady, 87 Geo. 660.

the entire property, and it all has been sold by the execution debtor.¹

§ 765. And so in Florida, an execution creditor having two funds, or properties, to resort to, as against another execution creditor of the same judgment debtor, whose writ reaches and controls but one of such funds or properties, will be compelled to first exhaust that fund or property which the other can not reach.² To sell otherwise would be a legal fraud.³

§ 766. This same rule of the inverse order of liability prevails in Virginia, where mortgaged lands are sold by the mortgageor in parcels. Those *last* sold are *first* subjected to satisfaction of the mortgage, and so on, successively.⁴ So, also, as to lands subject to judgment liens. Those last sold by the judgment debtor are first liable to be exhausted in satisfaction of the judgment.⁵

The date of the deed is but *prima facie* evidence of the date of sale, and it may be shown *aliunde* that the contract of purchase was anterior thereto, and thus give the younger deed priority of an older one, by relation back to the date of the contract under which it is made.⁶

§ 767. Under that statute it is also held that to enable the court to carry out its requirements, the court should, in mortgage foreclosures for interests or installments only, and other installments are not yet due, first ascertain if the property can be sold in parcels, without injury, so as to enable it to determine upon the proper decree to render in the case. If the whole is due, then the proper order is to sell the premises, or so much thereof as may be necessary to pay the debt and costs.⁷

§ 768. When judgments are liens upon real estate, such liens confer no manner of right or interest on the judgment creditors in or to the land, but merely the prior right to make out of the land the debt secured by the judgments.⁸

¹ Barden *v.* Grady, 37 Geo. 660.

² Ritch *v.* Eichelberger, 13 Fla. 169.

³ Ibid.

⁴ Henkle's Exrs. *v.* Allstadt, 4 Gratt. 284.

⁵ Rodgers *v.* McLuer's Admr., 4 Gratt. 81.

⁶ Sterrett *v.* Teaford, 4 Gratt. 84.

⁷ Piel *v.* Brayer, 30 Ind. 340; Harris *v.* Makepeace, 13 Ind. 560; Smith *v.* Pierce, 15 Ind. 216; Benton *v.* Wood, 17 Ind. 260.

⁸ Gilman *v.* Brown, 1 Mason, 221.

§ 769. Subject to this right of the creditors the judgment debtor may sell and convey his land. If sold and conveyed in parcels to different persons, and at different dates, during the life of the judgment liens and executions, sales thereof be afterward made to satisfy such judgments, the lands are to be levied and sold in the inverse order of their sale and conveyance by the debtor.¹ Upon the same principle, if part only of the lands be sold by the judgment debtor, then the remaining part is the first to be sold to satisfy judgment liens.²

§ 770. If a regular and sufficient deed of lands be made and delivered, but afterward, before record thereof, be voluntarily destroyed by the parties, it nevertheless confers the legal title on the grantee; and if no reconveyance be made, then a judgment subsequently rendered against the grantee becomes a lien on the land, and execution sale and deed thereon will convey the title to the purchaser at the execution sale.³

§ 771. It has been held that by the mutual consent of plaintiff and defendant, an execution sale may be made on a credit instead of for cash in hand. That it will be none the less the sale of the officer, or execution sale, in its nature and effect; and that, therefore, the failure of title to the property purchased at such sale will be no defense to an action on a note given for the purchase money.⁴

§ 772. Nor is such ruling at all at variance with the doctrine that the purchaser may recover (in equity) from the execution debtor, on it transpiring that the debtor did not own the property sold, for here the note is to the sheriff or to the plaintiff in execution.

§ 773. If the notice be to sell on one execution only, and the officer has additional ones against the same defendant at the time of the sale, he can not, without other notice of sale as to such additional executions, state the additional executions in his certificate of sale or in his deed. It is as to such other writs, if such course be taken, a virtual selling without notice.

¹ *Stuyvesant v. Hall*, 2 Barb. Ch. 151, 155; *N. Y. Life Ins. Co. v. Milnor*, 1 Barb. Ch. 353; *Marshall v. Moore*, 36 Ill. 321; *Mason v. Payne*, Walker Ch. 459; *Snyder v. Stafford*, 11 Paige, 71; *Relfe v. Bibb*, 43 Ala. 519.

² *Clowes v. Dickenson*, 5 Johns. Ch. 235, and the same case, 9 Cow. 405; *Hurd v. Eaton*, 28 Ill. 122; *Relfe v. Bibb*, 43 Ala. 519; *Winters v. Henderson*, 2 Hals. Ch. 31.

³ *Parshall v. Shirts*, 54 Barb. 99.

⁴ *Kilgore v. Peden*, 1 Strob. L. 18.

§ 774. The return, certificate and sale, should be based upon the writ under which the notice is given, and the amount sold for is to be correctly stated therein, so those entitled to redeem may know the amount to be paid.¹ The fund raised will then be subject to the order of the court as to its application on the several writs.²

§ 775. Though an officer holding an execution against several co-defendants will be bound, as in other cases, to first proceed against the personal property, yet he is not compelled to first exhaust the personal effects of each one of the defendants before proceeding to sell the lands of either; but it is his duty to first exhaust the personality of each one of such defendants, whose land he undertakes to levy and sell before so proceeding against the land.³

§ 776. If the return and other evidences of the sale of several lots of land sold on execution are silent as to the manner of selling them, then the presumption is that the officer did his duty and sold them severally.⁴

§ 777. Under the statute, in Massachusetts, a judgment creditor may sell on execution the lands of the judgment debtor, the title to which is fraudulently held by another, without first uncovering the fraud, and the purchaser at the execution sale has one year, from the time of sale, in which to file his bill in equity to clear away the fraudulent title and thereby perfect his own; but if he omits to do so within a year, the levy and sale are thereafter void.⁵

So, in case the land be set off to the execution creditor, in that State, by an extent, the right for one year to apply to equity to vacate the fraudulent title inures to the execution creditor, which right is lost however, and the levy and sale rendered void, if the application be not made within that time from the making of the extent.⁶

§ 778. Conditional bids, at an execution sale, will not be enforced against the purchaser, except the condition be complied with by the officer selling. If the officer unauthorizedly affix a

¹ *Mascraft v. Van Antwerp*, 3 Cow. 334.

² *Wiley v. Bridgman*, 1 Head, 68.

³ *Faris v. Banton*, 6 J. J. Marsh. 236.

⁴ *Love v. Cherry*, 21 Iowa, 210.

⁵ *Hayward v. Cain*, 110 Mass. 276.

⁶ *Ibid.*; Mass. Gen. Stat. of 1860, Chap. 103, Sec. 48.

condition or privilege to the sale, to induce bidding, there is no more authority to enforce the bid upon the purchaser without compliance with the condition than there is in the officer to affix a condition to the terms of sale, and the bidder, though the last and the highest, will not be held to a compliance. Thus, where the officer selling states that a superior lien will be discharged by the purchase money—or out of the purchase money—the buyer will only be held to perform, if the superior lien be extinguished.¹ The rule will hold good whether the sale be of real or personal property. In the case here cited, the property sold was personal.

§ 779. If there be a place designated by law, at which execution sales are to be made, then, at that place only, the sale can be legally had, and if made elsewhere it will be void. As where, by the statute, sales are required to be made at the door of the court house, the making of them elsewhere will invalidate the sale.²

§ 780. But the sale may be valid, if made at a different place than that required by law, if such sale, at such different place, be consented to by the parties to the writ, so as to bind the parties by estoppel; but such consent will not render the sale valid as against third parties who are creditors of the defendant.³

§ 781. It is the duty of the officer selling to return the money received as proceeds of the sale into court, in accordance with the ordinary or usual command of the writ.⁴

§ 782. It is held, in Nevada, that execution creditors buying at execution sales, on their own writs, must, if by the officer required, pay into the officer's hands the amount of the bid, and may not, as a matter of right, pay the same by receipting therefor upon the writ.⁵ The mere bid of the plaintiff does not satisfy the writ. It may be, and usually is the case, that the money is in part going to the officer himself, for his fees and commission, and

¹ *Vanslyck v. Mills & Co.*, 34 Iowa, 375.

² *Koch v. Bridges*, 45 Miss. 247; *Grace v. Garnett*, 38 Tex. 156; *Howard v. North*, 5 Tex. 310.

³ *Biggs v. Brickell*, 68 N. C. 239; *Lentz v. Chambers*, 5 Ired. L. 587; *Mason v. Williams*, 66 N. C. 564.

⁴ *Washington v. Sanders*, 2 Dev. L. 343; *Brewster v. Van Ness*, 18 Johns. 183; *Matthews v. Williams*, 13 Fla. 617; *Nelson v. Kerr*, 59 N. Y. 224. And payment to the clerk by the officer, in New York, is payment into court. *Ibid.*

⁵ *Sweeney v. Hawthorne*, 6 Nevada, 129.

there are always costs of court rightfully belonging to others, as officers or witnesses.¹ Moreover, we may add that the proper way is, as the writ *commands*, for the officer to *have* the money in court on the return of the writ; for in some cases only a judicial decision, where there are different claimants to the money, can rightfully decide to whom it is to be paid over.

§ 783. The ruling in Kansas, in regard to payment of the purchase money to the sheriff, in sales upon execution or orders of court, is, under the statute, that it is the duty of the officer to require the payment to be made in cash, immediately after striking off the property, and before reporting the sale for confirmation, and to hold the funds until the action of the court as to confirmation, which is required in that State in execution sales, is known,² and in an action against the sheriff for the money, he can not be allowed, after confirmation, to show that he never received the same.³

XII. WHO MAY NOT BUY.

§ 784. "No man can serve two masters." He who acts for others will not be permitted to act in the same matter for himself. He who sells for others, or on their account, can not buy for himself. The two relations of seller and buyer can not exist at one and the same time in one and the same person in reference to the same subject matter. The principle is the same whether the sale be made in proceedings at law or in equity. Such sales are void.⁴

§ 785. It has been held, however, that by consent of the execution debtor the officer selling may buy.⁵ But certainly not, if to the prejudice of other creditors.

§ 786. The general rule of law, that officers selling may not buy, is asserted in Georgia by a prohibitory statute, which not

¹ Sweeney *v.* Hawthorne, 6 Nevada, 129

² Ferguson *v.* Tutt, 8 Kansas, 370.

³ Ibid.

⁴ McConnel *v.* Gibson, 12 Ill. 128; McLeod *v.* McCall, 3 Jones L (N. C.) 87; Michoud *v.* Girod, 4 How. 503; Remick *v.* Butterfield, 31 N. H. 70; Wormley *v.* Wormley, 8 Wheat. 421; Harris *v.* Parker, 41 Ala. 604; Rice *v.* Cleghorn, 21 Ind. 80; Haddix *v.* Haddix, 5 Litt. 202; Wilson *v.* Troup, 2 Cow. 196; Cruse *v.* Steffens, 47 Ill. 112.

⁵ Lazarus' Lessee *v.* Bryson, 3 Bin. 54; Hewitt *v.* Stephens, 5 La. Ann. 640; Dempster *v.* West, 69 Ill. 613.

only prohibits buying at their own sales, but subjects the party so buying to punishment.¹

§ 787. To render an execution sale valid there must also be power and capacity in the purchaser to buy; for if these be wanting, no title will pass. As for instance where a county has a corporate capacity only for specified purposes, one of which is, capacity "to purchase and hold for the public use of the county, lands lying within its own limits," it is held that this capacity to take lands by purchase, is limited to and intended to apply only to those lands which are necessary for *actual* use, occupation and possession, and for the proper discharge of the administrative or other functions of the county, through its appropriate officers; and that therefore a county can not purchase lands at execution sale, not designed to be used for such public purposes; and that a sale to a county on execution, of lands for other than such purposes is void, though bought in collection of the county's own demand.²

§ 788. So in Texas, it is not objectionable for two or more persons unitedly to bid and purchase at execution sale, if it be done in good faith for their united benefit, and not for purposes of collusion, so as to buy at an under price.³

But purchases by a third party, for the benefit of the execution debtor, are fraudulent and void as against existing creditors, and will be uncovered in equity and subjected to sale for the debts due such creditors.⁴

So, purchase by the attorney controlling the writ, where there is an appearance of unfairness, makes him a trustee for those in interest; and so as to the execution creditor, however apparently fair.⁵

XIII. SALES IRREGULAR OR UNDER IRREGULAR PROCESS, OR JUDGMENTS.

§ 789. Mere irregularities will not avoid an execution sale, fairly made, to a *bona fide* purchaser. To render it void there

¹ Worthy *v.* Johnson, 8 Geo. 241; Harrison *v.* McHenry, 9 Geo. 164.

² Williams *v.* Lash, 8 Minn. 498.

³ James *v.* Fulcrud, 5 Texas, 512.

⁴ Smith *v.* Boquet, 27 Texas, 507. But to employ a bidder, to merely prevent a sacrifice, is held not to be illegal. Reynolds *v.* Dechaums, 24 Texas, 174.

⁵ Jones *v.* Martin, 26 Texas, 57.

must be wanting some one of the substantials which are indispensable to a valid sale;¹ for an erroneous judgment, or an irregular execution, are not necessarily void — mere error, or irregularity, where there is jurisdiction, does not render them void or avoid the sale; but merely renders the sale voidable, or subject to be set aside in a proper proceeding directly brought by some one of the parties interested. It can not be done collaterally under cover of other proceedings. And as against an irregular writ of execution the defendant therein alone can object. If he does not, he is considered as consenting, and a sale thereon is valid.²

And if the *fieri facias* be issued before the stay of execution has expired, it is but an irregularity for which the sale is liable to be set aside, but it does not void the sale.³ But were the law otherwise, yet where the execution debtor consents to the sale, he is estopped to dispute its validity.⁴

§ 790. Under the statute in Missouri, in relation to proceedings by writs of attachment, which provide that judgment in cases upon constructive notice, when the defendant makes default, shall be entered as in other cases, but shall *bind only the property*.

¹ *Allen v. Orris Parish*, 3 Ohio, 187; *Hopping v. Burnam*, 2 G. Greene, 39; *Jackson v. Roosevelt*, 13 Johns. 97; *Jackson v. Delancy*, 13 Johns. 537; *Woodcock v. Bennett*, 1 Cow. 711; *Jackson v. Bartlett*, 8 Johns. 361; *Landes v. Brant*, 10 How. 371; *Childs v. McChesney*, 20 Iowa, 431; *Herrick v. Graves*, 16 Wis. 157; *Simpson v. Simpson*, 64 N. C. 427; *Cunningham v. Felker*, 26 Iowa, 117; *Hubbard v. Barnes*, 29 Iowa, 239; *Durham v. Heaton*, 28 Ill. 264; *Mariner v. Coon*, 16 Wis. 465; *Hinds v. Scott*, 11 Penn. St. 19; *Wheaton v. Sexton*, 4 Wheat. 503; *Cavender v. Smith*, 1 Iowa, 306; *Love v. Powell*, 5 Ala. 58; *Ware v. Bradford*, 2 Ala. 676; *Stow v. Steel*, 45 Ill. 328; *Kinney v. Knoebel*, 47 Ill. 417; *Armstrong v. Jackson*, 1 Blackf. 210; *Anderson v. Clark*, 2 Swan, 156; *Dunn v. Meriwether*, 1 A. K. Marsh, 116; *Phillips v. Coffee*, 17 Ill. 154; *Burton v. Emerson*, 4 G. Greene, 397; *Willard v. Whipple*, 40 Vt. 219; *Butterfield v. Walsh*, 21 Iowa, 97; *Stein v. Chambliss*, 18 Iowa, 474; *Allen v. Plummer*, 63 N. C. 307; *Holland v. Adair*, 55 Mo. 40; *Hardin v. Lee*, 51 Mo. 241; *Freeman v. Thompson*, 53 Mo. 183; *Kane v. McCown*, 55 Mo. 181; *Waddel v. Williams*, 50 Mo. 216; *Groner v. Smith*, 49 Mo. 318; *Buchanan v. Tracy*, 45 Mo. 437; *Stewart v. Severance*, 43 Mo. 322; *James v. Gurley*, 48 N. Y. 163; *Wood v. Morehouse*, 45 N. Y. 368; *Paine v. Spratley*, 5 Kansas, 525; *White v. Cronkhite*, 35 Ind. 483; *Frakes v. Brown*, 2 Blackf. 295; *Doe v. Heath*, 7 Blackf. 154, 157.

² *Wilkinson's Appeal*, 65 Penn. St. 189; *Stewart v. Stocker*, 13 S. & R. 199; *Lowber & Wilmer's Appeal*, 8 W. & S. 387.

³ *Stewart v. Stocker*, supra; *Wilkinson's Appeal*, supra.

⁴ *Crawford v. Ginn*, 35 Iowa, 543.

erty attached, a judgment *in personam* is not subject to an objection either as to form or substance, and a *general* writ of execution issued thereon is not *void*, but may be *levied* on the property attached, and the same may be sold thereon.¹ If in such case it does not appear, when a levy and sale has been made that it was of the property attached, the court will presume that it was, in the absence of further light upon the subject, and such will be the presumption in a collateral proceeding involving the rights of a *bona fide* purchaser.

§ 791. And though the judgment and execution on which the sale be made, be *voidable* for *irregularity*—that is to say—so *irregular* that on application therefor they would be *set aside* and declared *void*, yet if no such application be made, and a sale be had thereon, in other respects unobjectionable, the sale will be valid.² Such case can not be successfully attacked in a collateral proceeding.³

§ 792. And so a sale to a *bona fide* purchaser, made on a *voidable*, but *not void*, writ, is valid, although the writ be afterwards set aside.⁴ But if the writ be absolutely *void*, no title passes even to a *bona fide* purchaser, for the sale itself is *void*.⁵

§ 793. But such sales may be reviewed and set aside for mere errors and irregularities by the court from whence issued the process on which the sales are made, but only in a reasonable and diligent time. Courts of equity or other courts will not take jurisdiction of such cases. Irregularities or inadequacy of price can not affect the title in a collateral inquiry.⁶

§ 794. About what are the requisites to a valid sale on execution, as a general principle, there is some diversity of authorities. Some of the rulings are, that the party setting up an execution sale must show a valid judgment, valid writ of execution, a levy and deed; and that all else, when these are shown, is between the parties to the execution and the officer selling.⁷ While in other

¹ Cabell v. Grubbs, 48 Mo. 353.

² Sterrett v. Howarth, 76 Penn. St. 438; Sheetz v. Wynkoop, 74 Penn. St. 198.

³ Sterrett v. Howarth, *supra*.

⁴ Hunt v. Loucks, 38 Cal. 372.

⁵ *Ibid.*

⁶ Wilson v. Miller, 30 Md. 82, 87; Waters v. Duvall, 6 Gill. & J. 76; Little v. Price, 1 Md. Ch. Decs 182; Nelson v. Turner, 2 Md. Ch. Decs. 73; Norris v. Campbell, 27 Md. 688; Simmons v. Vandegrift, 1 Saxton's Ch. 55; Bank of New Jersey v. Hassert, 1 Saxton's Ch. 1; Mercereau v. Prest, 2 Green. Ch. 460.

⁷ Wheaton v. Sexton, 4 Wheat. 503; Landes v. Brant, 10 How. 371; Landes

cases it is held that merely a valid judgment, and valid writ of execution, need be shown; and that if it does not appear whether there was a levy, and nothing to the contrary appears, the presumption is that the officer did his duty; and, therefore, where levies are held to be necessary, the presumption of law arises that the officer did his duty, and that a proper levy has been made;¹ but if no levy or return was really made, or notice of sale given, it would not affect a *bona fide* purchaser. Such are the general rulings on the subject,² while yet another class of cases hold that when the judgment on which the execution issues is in law a lien upon the land to be sold, then no levy whatever is necessary; and that as a consequence arising therefrom, the production of a valid judgment, execution, and a sheriff's deed purporting to have been made on a sale under such execution, is all that is required.³

§ 795. In the case first cited, the court, BRONSON, Justice, cite *Catlin v. Jackson*, 8 John. 546. But on reference to that case it is seen that the necessity of a levy was not therein involved, and that a levy was in reality made, and a return thereof setting

^{o.} Perkins, 12 Mo. 254; *Allen v. Parish*, 3 Ohio, 187; *Taylor v. Thomson*, 5 Pet. 369; *Butterfield v. Walsh*, 21 Iowa 97, 101; *Stein v. Chambliss*, 18 Iowa, 474, 476, 477; *Remington v. Linthicum*, 14 Pet. 84; *Sumner v. Moore*, 2 McLean, 59; *Thompson v. Phillips*, Bald. C. C. 246; *Shepard v. Rowe*, 14 Wend. 260; *Griffith v. Bogert*, 18 How. 158, 164; *Kinney v. Knoebel*, 47 Ill. 417; *Crane v. Hardy*, 1 Mich. (Man.) 56.

¹ *Carpenter v. Doe*, 2 Ind. 465, 467; *Smith v. Hill*, 22 Barb. 656; *Mercer v. Doe*, 6 Ind. 80; *Webber v. Cox*, 6 T. B. Mon. 110; *Lawrence v. Speed*, 2 Bibb, 401; *Draper v. Bryson*, 17 Mo. 71; *McFadden v. Worthington*, 45 Ill. 362, 366; *Dunn v. Meriwether*, 1 A. K. Marsh. 158; *Martin v. McCargo*, 5 Litt. 293; *Smith v. Moremon*, 1 T. B. Mon. 154; *Riggs v. Dooley*, 7 B. Mon. 239; *Wilson v. McGhee*, 2 A. K. Marsh. 602; *Cox v. Joiner*, 4 Bibb, 94; *Ferguson v. Miles*, 8 Ill. 358; *Cooper v. Galbraith*, 3 Wash. C. C. 546; *Bowen v. Bell*, 20 Johns. 338; *Whatley v. Newsom*, 10 Geo. 74. In this last case the court say, LUMPKIN, Justice: "Where a party relies on sheriff's title, it is only necessary to produce the execution, with the sale under it, and the deed made in pursuance thereto, and prove either title in the defendant or possession subsequent to the rendition of the judgment." In *Cooper v. Galbraith*, supra, the rule is laid down by WASHINGTON, Justice, that "the purchaser under an execution, in an ejectment against the defendant in the execution, or one claiming under him, need not show any other title than a judgment execution and a sheriff's deed."

² *Draper v. Bryson*, 17 Mo. 71; *Brooks v. Rooney*, 11 Geo. 423; *Smith v. Hill*, 22 Barb. 656.

³ *Wood v. Colvin*, 5 Hill, 228; *Tullis v. Brawley*, 3 Minn. 277; *Folsom v. Carli*, 5 Minn. 333, 337.

it out at large. The real objection was that the officer did not, on levying, take corporal possession of the land, which the court held was not only unnecessary, but was impracticable. That it was unlike a levy on personal property wherein the possession accompanies the levy. A special property is vested in the officer, and he is ordinarily requested to exercise over the property actual possession or control. In this case of *Catlin v. Jackson*, the court say that the first question "is as to the effect of the sheriff's seizure." * * * * That "in several essentials the effect of the execution must be different from a *f. fa.* levied on personal estate only. The delivery of the *f. fa.* gives no new rights to plaintiff and vests no new interests. The general lien is created by the judgment, and execution is merely to give that lien effect, not by vesting a possessory right to the land affected by it in the plaintiff, but by designating it for conversion into money by the operation of the *f. fa.*, and the act of the sheriff by virtue of it. It is not so as to personal property. That is bound from the delivery of the *f. fa.* to the sheriff. When he seizes he may remove it for safe keeping, and this not only to give effect to the seizure, but for his own security. * * * * None of these reasons apply to real estate. It is not necessary that the sheriff should possess himself of it for safe keeping."¹ Then this case, so far from involving the necessity of a levy, shows that a levy was really made on the land; that a return was made setting out the levy at large, and that a *renditioni exponas* then issued, on which the land was sold. The real point was, not whether a levy is necessary, but whether the levy which was made had the effect, before sale, to take away the debtor's right of entry on the land. The court held that it did not, because, unlike a levy of personality, the possession of the lands is not by the levy changed. We have given thus much of the opinion in that case, to show that it does not bear out the subsequent ruling in *Wood v. Colvin* as to there being no necessity of a levy when the judgment is a lien upon the land to be sold. Nor does the case of *Greene v. Burke*, referred to in *Wood v. Colvin*, come up to the point. This case was in replevin, and there was no necessity to consider levies on land, yet the learned judge (Justice COWEN) refers to the subject, and intimates an opinion that such levies are unnecessary, inasmuch as unlike a levy on personal property, they neither satisfy

¹ *Wood v. Colvin*, 5 Hill, 228.

the judgment to any extent, nor vest an interest in the officer in the land.¹

§ 796. The same principle, however, is fully asserted in Minnesota. It is there held, in as broad terms as in *Wood v. Colvin*, that in executing writs of execution issued on judgments which are liens upon the lands to be sold, no levy is necessary.²

§ 797. So, where in attachment proceedings, there is a judgment identifying the levy of the attachment, the date thereof, and land attached, and ordering the land by description to be sold on writ of *venditioni exponas*, or on special execution, then no levy of the writ of execution or of *venditioni exponas* is required. The attachment levy and order of sale stand instead of a subsequent levy of the execution, and the sale will relate back to and carry title from the date of the levy of the attachment. In such case the judgment itself is sufficient, and, indeed, the best evidence of the attachment levy and of the date thereof, which are therein fixed by judicial finding. The reason why no levy is then required of the writ of execution, is that the original attachment levy and the judgment seize the land, and the only office of the writ of special execution or of *venditioni exponas* is to bring about a sale.

§ 798. If, however, only an ordinary judgment be taken, and only an ordinary writ of execution issue, then a levy may be necessary, as in such case the chain of the attachment lien is broken of record; to fix that lien in any future controversy, (if it can be done at all) the execution purchaser must rely on the writ of attachment and levy thereof, if possibly to be found in the files of office under the modern practice where complete records are not usually made. If found, however, would they cut off the rights of an innocent intervening purchaser, without knowledge, and who buys of the execution debtor between the date of the attachment levy and the date of the judgment? We submit that in such case a *bona fide* purchaser would not be charged with notice of the attachment levy and lien thereof, after the writ had served its functions and had become dormant in the mere files of office.

§ 799. Although no interest is vested in the officer or in the plaintiff by the levy of an execution on lands—that is, no inter-

¹ *Greene v. Burke*, 23 Wend. 490, 498.

² *Tullis v. Brawley*, 3 Minn. 277; *Folsom v. Carli*, 5 Minn. 333, 337.

est in the property—yet a lien attaches, if none existed before, in behalf of the plaintiff by virtue of the levy, and a right in consequence thereof, to make his debt thereof as of priority to a proceeding of another subsequent thereto.

§ 800. It is urged, as we have seen, that because a levy on lands, unlike one on personalty, vests no property in the officer, that therefore no levy need be made, where there is execution on a judgment which in law is a lien; but suppose the judgment lien expire before sale, though after advertisement of sale, under such circumstances, what then becomes of the plaintiff's lien? What protection has he, as against an intervening *bona fide* purchase, made without notice, or even with notice of the intended sale? It is well settled that if a levy on lands be made during the execution debtor's lifetime, that a sale may be made after his death.¹ But how so if the levy is unnecessary, or if a levy has no effect? Although a levy on the realty, unlike one on personal property, vests not a property in the officer, yet we conceive that it effects such a lien upon and so seizes the title, as not only to place the same beyond the power of the debtor to sell as against the judgment lien, but as also to give priority over subsequent levies.

This very point was decided in *Bank of Missouri v. Wells*,² where the judgment lien expired after levy and before sale of the land by the sheriff. The court held that the previous levy preserved the lien of the judgment until the writ was fully executed.

§ 801. When the sale, as in *Wood v. Colvin*, is made upon a writ of *venditioni exponas*, no levy of that writ is necessary, for, if it follows a *fl. fa.*, the levy has already been made by the latter; and if it is ordered as an original, then it describes the land that is therein ordered to be sold. Such writ, however, usually follows a *fl. fa.* on which a levy has been made, but no

¹ *Wheaton v. Sexton*, 4 Wheat. 503.

² 12 Mo. 361. In this case the Supreme Court of Missouri dispose of the question in the following terms: "The lien of the judgment under which the defendant deduces his title was prior to that of the plaintiff, and long before the expiration of the prior lien an execution was sued out and delivered to the sheriff, the effect of which was to continue that lien until the execution of the writ, although the time had elapsed during which the lien of a judgment continued." * * * * "Then the prior levy of the executioner under the junior judgment, although the lien of that had not expired, did not divest the priority of the older judgment."

sale; the *venditioni exponas* then goes to complete the work, by order of the court. It directs the land previously levied on to be sold. The sale, when made, relates back to date of the levy on the *fieri facias*, and if the proper relation thereto has been kept up on the record and in the latter writ, carries title from that date; and the order for issuing the writ of *venditioni exponas* shuts out all collateral inquiry as to the regularity of the prior writ of *fieri facias*, and of the levy and return thereof.¹

§ 802. And when the levy is on real property, the writ of *venditioni exponas* may go to the same officer who levied the *fieri facias*, or to his successor, or to whomever the court may find it proper to direct, for, unlike levies on personal property, as has been said, no property is vested in the officer by the levy upon the land; the effect is only to create a lien, if there was none before, or to continue the lien of judgment, if there is such a lien, to a point of time beyond what it would run to in case it expires before the sale, and above all to attach the value of such judgment lien to the sale, so as to carry title over intervening obstacles back to and from its date.²

But where there is no existing judgment lien, the levy and sale relates only to the time of the levy, and dates as a lien from that date.³ If jurisdiction attaches, the ordering of the *venditioni exponas* will be presumed regular, and also the subsequent proceedings on collateral attack.⁴

§ 803. Execution sales of land, made without levy, will ordinarily be void, or if there be an alleged levy of impossible date, unless the circumstances are such that a levy is presumed in law, for a seizure is indispensable; without it nothing passes.⁵

§ 804. If two judgment liens exist against the same lands in favor of different creditors, and sale be made on process emanating from the junior lien, the rule, then, in Maryland, is not that the senior lien takes priority as to the proceeds, but that the

¹ Weir v. Clayton, 19 Ala. 132.

² Clark v. Sawyer, 48 Cal. 133. But if the levy of the *fieri facias* is on personal property, it vests a property in the officer and the *venditioni* must go to him, or he may sell without one, by virtue of the levy, after his office expires. Ibid. Tarkinton v. Alexander, 2 Dev. & Batt. L. 87; Rogers v. Darnaby, 4 B. Mon. 238.

³ Kenyon v. Quinn, 41 Cal. 325.

⁴ Clark v. Sawyer, supra.

⁵ Waters v. Duvall, 11 G. & J. 37; Elliott v. Knott, 14 Md. 121, 135; Jarboe v. Hall, 37 Md. 345.

holder of the senior lien has his remedy still by sale of the land, and his sale gives priority of title.¹ But in case of sale on the senior lien, the only remedy of the junior lienholder is against the surplus of the purchase money, if there be any, or else to redeem from the sale by virtue of his junior lien, and then enforce his lien against the property, together with the amount of the redemption money.²

In questions of priority where the State is concerned as a creditor, it has priority over all debts, except anterior lien debts.³

§ 805. In *Smith v. Hill*, 22 Barb. 656, 660, it is expressly ruled that a levy is presumed in law, when an execution sale, that is in other respects sufficient in law, is shown. In that respect the court hold the following language: "It is said there is no proof of levy. The presumption is that the sheriff did his duty and levied before the sale."

§ 806. In *Mercer v. Doe*,⁴ the court say: "The levy, sale and return of the writ were sufficiently shown by the sheriff's deed; but whether the land was sold with or without appraisement, does not appear in the record. * * * * It is true when the law requires a sheriff to appraise property taken on execution, a sale without appraisement would be a nullity; but in the absence of any proof on the subject, he will be presumed in that respect to have done his duty."

§ 807. In *Carpenter v. Doe*⁵ the action was ejectment involving title to land under a sheriff's sale. The court held that the execution purchaser was only bound to show a judgment, execution, sale and deed. In that case the court lay down the rule as follows: "It is a general rule that a purchaser at sheriff's sale is bound only to show the judgment of a competent court, an execution warranted by the judgment, and a sale and deed under it."

§ 808. As to the showing of a sale, we submit that the deed itself is sufficient evidence thereof in the first place.

§ 809. Allowing the doctrine that ordinarily it is necessary

¹ *Duvall v. Speed*, 1 Md. Ch. Decs. 229; *Brooks v. Brooks*, 12 G. & J. 307. Such, too, is the rule in New Jersey. *Williamson v. Johnson*, 12 N.J. (7 Hals.) 86; *Den v. Young*, Id. 300.

² *Brawner v. Watkins*, 28 Md. 217, 225, 226.

³ *Maryland v. The Mayor & C. C. of Balt.*, 10 Md. 504.

⁴ 6 Ind. 80, 81; *Carpenter v. Doe*, 2 Ind. 465.

⁵ 2 Ind. 465, 467.

only to show a judgment, execution, and sheriff's deed purporting to have been made in pursuance of a sale thereon to be the better ruling, still it does not follow that the ruling in the leading case of *Wheaton v. Sexton*, 4 Wheat. 503, was incorrect, for in that case the sale was made after the death of the defendant in execution, and it became, therefore, necessary to show a levy to bring the case within the power of the officer to sell, to do which he had no power as against a dead defendant, unless the levy was made before the death occurred. In cases, then, of that class a levy becomes important as fixing the power of the officer to proceed. The want of it, then, is not a mere irregularity, but a question of power. The one is cured by presumption of law when judgment, execution, and sale is made; the other, like jurisdiction in an inferior court, is not inferred. The letter of the case of *Wheaton v. Sexton* seems to have been subsequently followed in some cases wherein the sales were against living defendants, and which were not in fact within the spirit or the reason of the case thus recognized as a precedent, without any controversy raising the question of distinction which we have here referred to.

§ 810. Upon the whole we conceive it to be the duty of the officer, in all cases, in executing a writ of *fieri facias*, to levy, whether the property be real or personal; and that if the sale be subsequent to the death of the execution defendant, a levy must not only be shown, but must have been made prior to the defendant's death, or else the sale can not, without more, be sustained, whatever the effect might be, of lapse of time coupled with possession. That in all other cases arising under such writ of *fieri facias*, while it is in like manner the duty of the officer to levy, the omission so to do, or to advertise the sale, or to make a return, will not affect a *bona fide* purchaser, if the sale be in all other respects sufficient and fair, even if it be made to appear thereafter, in a collateral proceeding, that such irregularities occurred; and that in case it is not made to appear either the one way or the other, then by presumption of law the officer did his duty, and the court will hold that the requirements of the law in these particulars were complied with.

§ 811. An execution issued after a year and a day from the rendition of the judgment, "the time limited" within which an execution must issue, and at the end of which the judgment becomes dormant, is held to be valid, though there be no revival

of the judgment. Such process is only voidable and not void. It is a justification until set aside, and a sale thereon in other respects proper will be sustained as against the execution debtor. He can not stand by and suffer the sale to be consummated and afterward be allowed to question its validity in a collateral proceeding.¹

§ 812. In the case of *Childs v. McChesney*,² in reference to irregular execution sales, the court, after noticing the fact that the Iowa statute raises a presumption in favor of regularity where the contrary does not appear, go on and lay down the rule of law on general principles, that a mere irregularity in the proceedings, writ or sale, will not render the sale void, and such is the prevailing doctrine of the books. In *Wheaton v. Sexton*, in the Supreme Court of the United States, the court lay down the rule that "the purchaser depends on the judgment, the levy, and the deed." "All other questions are between the parties to the judgment and the marshal."³

§ 813. But if a sale be made in a manner inhibited by the statute, and such irregularity is made to appear upon the face of the proceedings, under and by virtue of which the purchaser at sheriff's sale makes title, the presumption of regularity and that the officer has conformed to his duty is, by such showing to the contrary, overcome and will not avail the execution purchaser.⁴ The rule *caveat emptor* will then apply.

§ 814. But a clerical error merely will not vitiate a sheriff's deed;⁵ especially when offered in an equitable proceeding.

§ 815. Statutes requiring levies to be made of personal property, before proceeding to levying real estate, are ordinarily directory only, and a non-compliance therewith will not render a sale of lands invalid.⁶

§ 816. And the omission of the sheriff to inquire, in selling,

¹ *Summer v. Moore*, 2 McLean, 59; *Armstrong v. Jackson*, 1 Blackf. 210; *Childs v. McChesney*, 20 Iowa, 431; *Willard v. Whipple*, 40 Vt. 219.

² 20 Iowa, 43.

³ 4 Wheat. 503; *Phillips v. Dana*, 4 Ill. 551, 558; *Wood v. Colvin*, 5 Hill. 231; *Jackson v. Roosevelt*, 13 Johns. 97; *Cavender v. Smith*, 1 Iowa, 306; *Cox v. Joiner*, 4 Bibb, 94; *Averill v. Wilson*, 4 Barb. 180.

⁴ *Piel v. Brayer*, 30 Ind. 332; and see *Stewart v. Houston*, 25 Ark. 311, as bearing on the same principle.

⁵ *Stow v. Steel*, 45 Ill. 328.

⁶ *Cavender v. Smith*, 1 Iowa, 306; *Hayden v. Dunlap*, 3 Bibb, 216; *Beeler v. Bullett*, 3 A. K. Marsh. 281.

if any one will pay the debt and costs for a less quantity of land than that covered by the best bid, though an irregularity, will not vitiate the sale.¹ If the sale be on two executions, one of which is void and the other valid, the title of the purchaser will be sustained.² The contrary is however held in Indiana.³

§ 817. A sale, on an *alias* writ, when the process should be a *venditioni exponas* is not void.⁴ Nor will a variance in the amount sold for and the amount named in the deed avoid the title.⁵

§ 818. Where a judgment bore date on the 12th day of the month and the execution described the judgment as rendered on the 13th day of the month, and a sale was made under the execution by the sheriff, it was held that such discrepancy did not avoid the sale.⁶

§ 819. Upon the principle that in law the whole term of the court is as one day, the exact date of the judgment may well be immaterial if the term is sufficiently apparent.

§ 820. Nor will the variance of a small sum between the real amount of the judgment and the amount stated in the execution render a sale void if the execution otherwise identifies the judgment.⁷

§ 821. The irregularity of selling lands situate in a county other than the one from which the execution emanates, without first filing a transcript of the judgment in the county where the lands are, as required by statute, will not avoid the execution sale as between the execution debtor and purchaser who buys with notice. The object of the statute is to impart notice of the sale and to afford the judgment creditor the means of making his judgment a lien. But the statute is merely directory, and therefore a levy before the debtor has sold away the land gives the lien, and a sale thereon gives title as against all persons buying with actual notice of the sales. Where actual notice exists, the implied notice from the record contemplated by the statute becomes unnecessary. Its necessity is superseded.⁸

¹ *Floyd v. McKinney*, 10 B. Mon. 89.

² *Herrick v. Graves*, 16 Wis. 157.

³ *Brown v. McKay*, 16 Ind. 484.

⁴ *Stein v. Chambless*, 18 Iowa, 474; *Simpson v. Simpson*, 64 N. C. 427.

⁵ *Herrick v. Graves*, 16 Wis. 157.

⁶ *Stewart v. Severance*, 43 Mo. 322.

⁷ *Cunningham v. Felker*, 26 Iowa, 117.

⁸ *Hubbard v. Barnes*, 29 Iowa, 239; and see the Chap. on Collateral Impeachment and Revision of Iowa of 1873, Secs. 2882, 2884, 3027, 3031.

§ 822. Sales on executions issued upon dormant judgments, are not absolutely void, but are voidable at the option of the execution debtor in some direct proceeding only. They can not be avoided collaterally.¹

§ 823. Judgments of the so-called confederate courts, if not considered totally void, are not liens, and are of no higher character than foreign judgments. If sued on they may be impugned, and their justness inquired into.² The true doctrine, however, is believed to be, that such judgments are nullities, as the emanations of unauthorized tribunals.³

§ 824. Though the original process be from a confederate court, and be served during the war upon a defendant, yet if the judgment against such defendant be rendered by a court of the provisional government after the war and under regular authority, and sale on execution therefrom be made, it will be good, if in other respects sufficient, notwithstanding the inception of the proceedings was under an irregular or unauthorized tribunal.⁴ The court being legally constituted which renders the judgment, the party defendant being in court, and process and sale regular, the title passes thus by force of law.⁵

No act of the judgment debtor done or suffered, after the date of the judgment lien under which sale on execution is made, will prejudice the purchaser.⁶

The sale on execution must be made according to the requirements of the law and the exigencies of the writ. No additional terms or conditions are allowable by the officer, else he might defeat such sales entirely.⁷ A purchase for the benefit of the execution debtor, he being insolvent, is fraudulent as against his creditors.⁸ But on setting the sale aside and making a resale, any rightful lien of such fraudulent purchaser originally held against the property will be respected and allowed in its order of priority.⁹

¹ Moseley *v.* Doe, 2 Fla. 429; Ector *v.* Ector, 25 Geo. 274, (and process indefinitely postponed by plaintiff, is treated as if emanating from a dormant judgment. Smith *v.* Dickson, 9 Geo. 400.)

² Martin *v.* Hewitt, 44 Ala. 418; Noble *v.* Cullom, 44 Ala. 554.

³ Cent. R. R. & Banking Co. *v.* Ward, 1 With.'s Corp. Cases, 299.

⁴ Bush *v.* Glover, 47 Ala. 167.

⁵ Stump *v.* Henry, 6 Md. 201; Barney *v.* Patterson, 6 Har. & J. 184, 204.

⁶ Campbell *v.* Lowe, 9 Md. 500; Vandyke *v.* Bastedo, 15 N. J. (3 Green) 224.

⁷ Stevenson *v.* Black, 1 Saxton's Ch. 338, 344.

⁸ State Bank *v.* Marsh, 1 Saxton's Ch. 288.

⁹ Ibid.

§ 825. A sale of real property on execution, in Tennessee, on several writs, all of which are void, save one, which is valid and good, is not invalidated by the fact of part of the writs being invalid, but is upheld by the valid writ.¹

But the purchaser takes the land subject to such equities as existed against it while the property of the debtor.²

Where the plaintiff in execution becomes the purchaser of lands at execution sale, and receives a conveyance therefor from the officer, making payment by receipting to the officer on the writ for the amount of his bid, he not only becomes liable for the ordinary costs, but for the same percentage or commissions of the officer upon the amount of the bid to which the officer would have been entitled in law, if the purchase had been made by a stranger to the writ, and the money had passed through the officer's hands. The services commanded by the writ having been fully performed the officer is entitled to his commission, if there be no exception of such cases by statute.³

§ 826. Execution sales will not be enjoined for the reason that one person's property is about to be sold for the debt of and as the property of another, unless the circumstances are such that the sale will work an irreparable injury, as for instance the irresponsibility of the officer selling, by reason of which no reparation could be had by an action against him in case there should be a sale and conversion of personal property, or a casting of a cloud upon the title of real property.⁴

XIV. SALES MADE AFTER THE DEATH OF THE EXECUTION DEFENDANT.

§ 827. At common law no execution could legally issue on a judgment after the death of either of the parties, plaintiff or defendant, until the judgment was, by *scire facias*, revived in favor of or against the administrator or executor of the deceased party, plaintiff or defendant, as the case might be. Such is the general law yet of the several States where the common law

¹ Glasgow's Lessee *v.* Smith, 1 Overton, 143; Wallen *v.* McHenry, 2 Yerg. 313.

² Simmons *v.* Tillery, 1 Overton, 274; Berry *v.* Walden, 4 Hayw. 174; Henderson *v.* Overton, 2 Yerg. 396.

³ Arnold *v.* Dinsmore, 3 Coldwell, 235.

⁴ Chappell *v.* Cox, 18 Md. 513, 519.

prevails. But as to the effect of execution and sale thereon where the execution thus issued without revival, after the death of a party, there is a difference of opinion. In some of the States they are held to be absolutely void; in others only voidable.¹ The weight of authority is that they are void.² Yet each of the different rulings are paramount authority in the respective States wherein they are made. In some of the States the practice of revival still exists; in others, statutory innovations have been made. Again, where innovations are made, the practice of revival, and the statutory remedy, are sometimes, if not always, concurrent, so that either may be pursued, and omission to pursue one or the other will result in the same consequences. All will be void or voidable according to the rulings above referred to in the different States.

§ 828. By statute, in Illinois,³ execution may issue after the death of the judgment debtor against the lands and tenements of the decedent without first reviving the judgment against the administrator or heirs, but not until one year has expired, provided also the plaintiff first give the executor or administrator or heirs of such deceased debtor three months' notice in writing.

¹ Doe *v.* Hamilton, 23 Miss. 496; Butler *v.* Haynes, 3 N. H. 21; Speer *v.* Sample, 4 Watts, 367; Lucas *v.* Doe, 4 Ala. 679; Abbercrombie *v.* Hall, 6 Ala. 657; Woodcock *v.* Bennett, 1 Cow. 711.

² Stymets *v.* Brooks, 10 Wend. 207; Hildreth *v.* Thompson, 16 Mass. 191; Massie *v.* Long, 2 Ohio, 287; State *v.* Pool, 6 Ired. L. 288; Gwin *v.* Latimar, 4 Yerg. 22; Abbercrombie *v.* Hall, 6 Ala. 657; Webber *v.* Kennedy, 1 A. K. Marshall, 345; The State *v.* Michaels, 8 Blackf. 436; Erwin's Lessee *v.* Dundas, 4 How. 58; Brown *v.* Parker, 15 Ill. 307. Speaking of common law proceedings, in Brown *v.* Parker, the court say the weight of authority is that "proceedings upon an execution sued out after the death of one of the parties without first reviving the judgment for or against the proper representative, are absolutely void, whether their validity be drawn in question directly or collaterally." That "judicial proceedings can not be carried on in the name of a dead man. There is as much necessity for a plaintiff as a defendant. The proceedings in either case are as much arrested by the death of one as of the other." In Erwin's Lessee *v.* Dundas, the Supreme Court of the United States sum up the law of this subject in the following terms: "Upon the whole, without pursuing the examination further, we are satisfied that, according to the settled principles of the common law, and which are founded upon the most cogent and satisfactory grounds, the execution having issued and bearing teste in this case after death of one of the defendants, the execution was irregular and void, and the sale and conveyance of the real estate of the deceased under it to the plaintiff was a nullity."

³ Hurd's St. of Ill. of 1877, p. 599, Sec. 39.

of the existence of such judgment. If execution issue and sale be made in violation of these requirements, it is held that the purchaser at such sale takes nothing, and the sale is void, so that no title passes under the deed of the sheriff.¹ And if a notice be given, but describing the date of the judgment as of a different year than the date of the one on which execution really issues, the result will be no better; if sale be made no title will pass by the deed,² although it may have been intended to give notice of the judgment on which the writ really issued, as was probably the intention in the case above cited. And a sale made on execution issued on a dormant judgment, after the death of the judgment debtor, and without revival by *scire facias*, is void, and will not confer any rights as against the heir.

§ 829. The statute of Illinois allowing writs of execution to issue on judgments after the death of the judgment debtor, does not authorize their issuance on dormant judgments.

§ 830. When judgment liens have become dormant by running seven years, they must then be revived by *scire facias* before execution can legally issue. Nor, under said statute, can execution issue in a like case, or even if the judgment be not dormant, after the death of the plaintiff, without the appointment of an administrator of such plaintiff, and recording the appointment in the court where the judgment is. And in either case, if the lien has expired by the intervention of seven years, from the date of the judgment, then, although execution has been issued within a year and a day, the judgment must be revived from its dormant state before execution can legally go.³

§ 831. If the judgment plaintiff die before execution issues, then, by the statute of Illinois, the personal representative of the decedent may have execution in his own name, by recording in the court where the judgment was obtained the letters of administration or testamentary of such personal representative, (or may revive the judgment in his own favor by *scire facias*, and thus have execution;) but if, on the death of the plaintiff, the executor or administrator take out execution without so

¹ Clingman v. Hopkie, 78 Ill. 152.

² Pickett v. Hartsock, 15 Ill. 279.

³ Scammon v. Swartwout, 35 Ill. 326. If the judgment debtor be dead, the *scire facias* must make the heirs a party and give them a day in court, after the lien has expired, as the title has then vested in them. Ibid., and Turney v. Young, 22 Ill. 253.

recording his letters in the court where the judgment exists, or first making himself a party to the judgment, such execution, if neither the one nor other of these previous steps be taken, will be void, and all the proceedings and any sale under it will likewise be void, and no rights will inure therefrom.¹

§ 832. But in case the execution issue and be levied during the lifetime of the parties, then the officer in charge thereof may proceed to sell notwithstanding the death of a party, and it will, at most, amount merely to an irregularity, but will not render the sale invalid.²

§ 833. In Pennsylvania it is held that a levy and condemnation of land to sale, made on execution while the general lien of the judgment still exists, carries with it a particular lien acquired by the levy and condemnation, indefinite in extent of time, and by virtue of which, a sale on a *venditioni exponas* issued in pursuance thereof, carries title to the purchaser by virtue of the lien so created by levy of the original execution, and condemnation to sale thereon, and that no revivor is necessary as against the widow and heirs, if, in the mean time, the judgment debtor should die. That even the lapse of ten years' time between the original levy of the writ of execution and the sale *under the venditioni exponas*, would not affect the sale nor the title of the purchaser thereat.³

§ 834. And though, by statute, in Iowa, the presumption is in favor of sheriff's sales, by reason whereof the silence of the sheriff's deed as to whether the sale was made on an *alias f. fa.*, or on a *venditioni exponas*, would be presumed to have been made on the latter; yet the Iowa courts hold that on general principles an irregularity in selling on *alias* instead of on a *venditioni exponas*, will not vitiate the sale.⁴

§ 835. And where a levy of a *f. fa.* is made during the life of the execution defendant, the Supreme Court of the United States have held that the writ of *venditioni exponas* may issue after defendant's death, to complete the sale.⁵

¹ Brown *v.* Parker, 15 Ill. 307.

² Sumner *v.* Moore, 2 McLean, 59; Wolf *v.* Heath, 7 Blackf. 154; Sprott *v.* Reid, 3 G. Greene, 489; Speer *v.* Sample, 4 Watts, 367; Butler *v.* Haynes, 3 N. H. 21; Butterfield *v.* Walsh, 21 Iowa, 97; Gamble *v.* Woods, 53 Penn. St. 158, 160; Wheaton *v.* Sexton, 4 Wheat. 503; Wood *v.* Morehouse, 45 N. Y. 368.

³ Shearer *v.* Brinley, 76 Penn. St. 300 (1874).

⁴ Childs *v.* McChesney, 20 Iowa, 481; Butterfield *v.* Walsh, 21 Iowa, 97.

⁵ Taylor *v.* Miller, 13 How. 287; Bleecker *v.* Bond, 4 Wash. C. C. 6.

§ 836. And so, where sale on execution under the valuation law fails for want of a bid to the amount by law required, and the execution, after levy and such effort and failure to sell, is returned, if in the meantime the defendant in execution dies, a writ of *venditioni exponas* may legally issue without revival by *scire facias*, notwithstanding the death of the defendant, and a sale thereon will be legal and valid. Such sale will confer on the purchaser the same rights in reference to the date of the lien as if it were made on the original writ and levy.¹

§ 837. If sale is made on a writ issued after defendant's death, in Alabama, then both the writ and the sale are void, and the sale will be set aside on application of those interested in the property; for, by the death of the judgment debtor, the lands descend to his heirs and the writ thus issued can not reach their interest.²

§ 838. So an execution sale of a leasehold estate, after the lease is forfeited, or become subject to forfeiture for non-payment of rent, carries nothing.³

XV. SALES WHEN THERE IS A VALUATION LAW.

§ 839. As respects valuation of the property, execution is to be made in accordance with the law in force at the date of the contract on which the judgment is rendered; and if the contract be made under a valuation law, then the sale on execution should conform to its provisions, although the law be repealed, before execution or even before judgment.⁴

§ 840. In such case no bid, when the property has been appraised, should be received of a less sum than the relative amount of the appraised value required by the statute; and a

¹ Taylor *v.* Miller, *supra*. This was a case brought up from Mississippi, where the doctrine prevails in the State courts that such a sale is not absolutely void, but is only voidable in some direct proceeding, and can not be assailed successfully in a collateral proceeding. Smith *v.* Winston, 2 How. (Miss.) 601; Drake *v.* Collins, 5 Id. 253; Harrington *v.* O'Reilly, 9 S. & M. 216.

² Beach *v.* Dennis, 17 Ala. 262.

³ Lucas *v.* Price, 4 Ala. 679.

⁴ Cooke *v.* Brice, 20 Md. 397, 403.

⁵ Rue *v.* Decker, 3 McLean, 575; Coriell *v.* Ham, 4 G. Greene, 455; Burton *v.* Emerson, 4 G. Greene, 393; McCracken *v.* Hayward, 2 How. 608; Hobson *v.* Doe, 4 Blackf. 487; Lane *v.* Fox, 8 Blackf. 58; Harrison *v.* Stipp, 8 Blackf. 455; Law *v.* Smith, 4 Ind. 56; Tevis *v.* Doe, 3 Ind. 129; Bronson *v.* Kinzie, 1 How. 311; Rawley *v.* Hooker, 21 Ind. 144; Collier *v.* Stanbraugh, 6 How. 21.

sale for a less sum is void.¹ To make a valid appraisement all the appraisers must ordinarily agree.²

§ 841. And so, in Iowa, it is held in like manner that an execution plaintiff buying in satisfaction of his own writ, at sheriff's sale made without appraisement, is chargeable with notice of the irregularity, and takes nothing by his purchase. So, likewise, if the assignee of the judgment buy under like circumstances. The court decline to say what the effect in Iowa would be if the purchase was by a third party, as the question did not arise in the case before them; but held the purchase by the beneficiary of the writ as void.³

§ 842. So, in *Sprott v. Reid*, and other cases, in Iowa, it had been previously held that whoever were the purchasers, such sales, without valuation, were void; that the want of valuation affected the power of the officer.⁴

§ 843. As to the result of execution sales made in disregard of a valuation or appraisement law, the authorities are by no means uniform, some holding that such sales are void,⁵ while by others, though regarded as irregular, they are held to pass the title to the purchaser, as only voidable and as not open to collateral inquiry.⁶

§ 844. We regard that as the true rule which is laid down in a parallel case, *Gantly's Lessee v. Ewing*,⁷ by the Supreme Court of the United States, that if the law be merely directory as to the duty of the officer, then the sale and deed, without appraisement, will carry the title; but if the law contains an inhibition to sell without conforming to its requirements, then sales in disregard thereof are void. A sale on execution to satisfy pecuniary fines due to the State are not subject to valuation laws.⁸

¹ *Harrison v. Rapp*, 2 Blackf. 1; *Tyler v. Wilkerson*, 27 Ind. 450.

² *Evans v. Landon*, 6 Ill. 307.

³ *Maple v. Nelson*, 31 Iowa, 322; *Sprott v. Reid*, 3 G. Greene, 497.

⁴ *Sprott v. Reid*, supra; *Coriell v. Ham*, 4 G. Greene, 455; *Burton v. Emerson*, 4 G. Greene, 393.

⁵ *Doe v. Collins, Smith*, (Ind.) 58; *Evans v. Ashby*, 22 Ind. 15; *Tyler v. Wilkerson*, 27 Ind. 450; *Fletcher v. Holmes*, 25 Ind. 458, 471. But not so, in Indiana, if against a public officer, executor, administrator, guardian, or attorney at law, for some accountability as such. In such case no appraisement is allowed by law in that State. *Ibid.*

⁶ *Shaffer v. Bolander*, 4 G. Greene, 201; *Butterfield v. Walsh*, 21 Iowa, 101.

⁷ 3 How. 707, 716, 717.

⁸ *Walshe v. Ringer*, 2 Ohio, 327.

§ 845. An appraisement law in force in a State at the time of making a contract in such State, enters into and becomes a part of the contract, and execution sale thereon in such State must be in conformity thereto.¹ But in case of a contract made in a State other than that wherein the judgment is rendered thereon, then the sale is not to be in conformity to the appraisement law of the State where the contract was made, but in accordance with the law of the State where the judgment is rendered, as it exists at the date of the judgment.²

§ 846. If one becomes replevin bail for another, in a judgment when and where there is no law requiring appraisement of property to be sold under such judgment, and the debt is realized out of the bail, then no appraisement is necessary in selling the land of the principal on execution in favor of the bail to reimburse him for the amount paid, if the sale be in the same State.³

§ 847. If judgment be rendered as an entirety on debts due by two distinct notes, one of which was executed under a valuation or appraisement law, and the other not, and land of the judgment debtor be sold without appraisement, and without the debtor's consent, upon a general execution issued on such judgment, and a conveyance be made accordingly, it is held, in Indiana, that the grantee of the sheriff takes no title.⁴

§ 848. The mere omission of the sheriff in his return to show that the property was appraised, is not conclusive; that fact is open to proof *aliunde*.⁵ Moreover, valuation will be presumed if nothing appears in regard to it.⁶

§ 849. Where it does not appear under what law the contract was made on which the judgment is rendered, then the appraisement law in force at the time and place of the rendition of the judgment must control.⁷

¹ *Law v. Smith*, 4 Ind. 56; *Doe v. Collins, Smith*, (Ind.) 58; *Holland v. Dickenson*, 41 Iowa, 367.

² *Hutchins v. Barnett*, 19 Ind. 15; *Doe v. Collins*, 1 Ind. 24; *Doe v. Collins, 1 Smith*, (Ind.) 58; *Shaffer v. Bolander*, 4 G. Greene, 201; *Story Conf. of Laws*, Sec. 556.

³ *Tevis v. Doe*, 3 Ind. 129.

⁴ *Babcock v. Doe*, 8 Ind. 110.

⁵ *Thurston v. Barnes*, 10 Ind. 289.

⁶ *Evans v. Ashby*, 22 Ind. 15.

⁷ *Indiana C. R. Way Co. v. Bradley*, 15 Ind. 23. Where, by statute, the rents and profits are first required to be appraised and offered, a sale in disregard thereof is void. *Ibid.* and *Davis v. Campbell*, 12 Ind. 192.

§ 850. In Indiana, a valid levy of an attachment upon real estate is a lien from the date of the levy, both in its own behalf and in behalf of other creditors subsequently attaching and coming in to participate in the proceeds. Such lien overreaches the lien of judgments of subsequent date rendered in proceedings instituted on ordinary process of summons.

When such attachments are prosecuted to judgment, and several executions issue thereon, some of which are subject to the valuation law and others not, and neither of them has priority over the other, then, as the sale must necessarily be made on all the writs together, it may be made without valuation, and will, when so made, be valid.¹

§ 851. When, under the valuation law, a sale of real estate on execution fails for want of a bid, to the amount required on valuation by the statute, by reason whereof the writ is returned and a *venditioni exponas* issues, and sale is made thereon, such sale relates back to the original levy and is but a continuation of the proceedings on the original writ. It saves the lien as an *alias* would have saved it, and is a valid sale.

§ 852. If, in the meantime, the defendant die between the time of the levy of the *fieri facias* and the issuing of the writ of *venditioni exponas*, the latter may legally issue, notwithstanding his death, and a sale thereon is valid, and carries with it all the rights as to lien acquired by the original levy of the *fieri facias* or by the judgment. No revival by *fieri facias* is necessary.²

§ 853. And where, as in Indiana, the execution debtor assented to a sale being made in disregard of the valuation law, upon a writ of execution which came within the terms of the law, and which required valuation of the property about to be sold, the courts of that State held that such defendant "could not be heard to say that the sale was void for want of appraisement." In such case the court say: "The maxim, 'that to which a person assents is not esteemed in law to be an injury,' is applicable here." The sale thus made by consent, the property not being appraised, was, therefore, sustained by the court.³

¹ Shirk *v.* Wilson, 13 Ind. 129.

² Taylor *v.* Miller, 13 How. 287. This is the case from Mississippi, where it was held, as has been seen, that in case of levy before a defendant's death, sale thereafter may be made without renewing the judgment.

³ Stockwell *v.* Byrne, 22 Ind. 6.

§ 854. The disqualification of one of the appraisers of lands about to be sold on execution, as that he is not a householder, where the statute requires householders as appraisers, does not, in Iowa, avoid an execution sale.¹ Though the contrary is the ruling in some others of the States.²

§ 855. In Iowa, the policy of the law is to uphold and maintain execution sales, and the statute of Iowa does not require the qualifications of appraisers to be embodied or shown in the sheriff's return. These, the court say, "rest *in pais*." And if the validity of a sheriff's sale is made to depend upon the qualification and selection of the appraisers, the purchaser holds his title continually at the hazard of having it defeated by parol testimony.³

§ 856. But by a subsequent decision in the same State the execution debtor was allowed to redeem, though the sale was made under appraisement, where it appeared that one of the appraisers was not a householder — was chosen by plaintiff's attorney, and resided thirty-five miles from the land appraised; that it was appraised for less than half its value and was purchased at the appraisement price by the execution plaintiff, the application to redeem having been made within a reasonable time.⁴ In this case the court drew a distinction between it and the case of *Hill v. Baker*, 31 Iowa, cited in the note to the preceding section, in that there the land was purchased by a third party and had been subsequently twice conveyed, and the question as to redemption was not made until two years after the sale.

§ 857. And by a still later decision, it is held that the burden of proof is on the person seeking to set aside an execution sale, on the alleged ground of selling for a less sum than the relative value required by the statute over and above the amount of incumbrances existing upon the property; and that the execution purchaser, in ascertainment of such incumbrances, is not bound to look behind the records of the county, nor need he go further than to such records to satisfy himself if incumbrances thereon are in fact satisfied or not.⁵

¹ *Hill v. Baker*, 32 Iowa, 302.

² *Eddy v. Knap*, 2 Mass. 154; *Whitman v. Tyler*, 8 Mass. 284.

³ *Hill v. Baker*, *supra*.

⁴ *Woods v. Cochrane*, 38 Iowa, 484.

⁵ *Barber v. Tryon*, 41 Iowa, 349.

§ 858. By act of Congress of March 2nd, 1793, it was enacted that wherever by the laws of any State it was then required that goods taken in execution should be appraised, so in like manner there should be an appraisement when taken in execution on executions from the United States courts; and that in case the appraisers, on being summoned by the marshal, fail to attend, then the marshal should sell without appraisement.¹ This provision was in effect extended to all the States then in existence, by the act of May 19th, 1828, which latter act gave the United States courts power to adopt, from time to time, the forms and process of the several States wherein they were held, and this act was extended to all the States then in existence by act of Congress of the 1st of August, 1842.² So that wherever the State processes have been adopted by such acts, or subsequent acts of Congress, or by orders of court made in pursuance thereof, the appraisement laws of the several States in force at such adoption are applicable to process from the United States courts.

§ 859. The State laws form the law and guide of the United States courts in the several States, in ascertaining the rights of litigants in the subject matter of litigation before them up to the time of judgment; but not the law of practice and process before or after judgment, unless adopted by act of Congress or by some order or rule of court.

§ 860. The remedy, after judgment, as to proceedings on execution conforms to the State laws in similar cases, if such laws are adopted, and not otherwise.³ But it is held that the adoption of the process and "proceedings thereupon," is also an adoption of the incidents attached thereto, as to valuation and exemption laws; provided they be not unconstitutional, whether the law of such incidents be expressly adopted or not.⁴

§ 861. In *Amis v. Smith*,⁵ the United States Supreme Court, MCKINLEY, Justice, hold the following language: "We think

¹ Brightley's Digest of Laws, 268, Sec. 2.

² Ibid. 269, Sec. 6; Catherwood *v.* Gapete, 2 Curt. 94; U. S. *v.* Knight, 14 Pet. 301.

³ Wayman *v.* Southard, 10 Wheat. 1; U. S. Bank *v.* Halstead, 10 Wheat. 51; Amis *v.* Smith, 16 Pet. 309, 313.

⁴ United States *v.* Knight, 14 Pet. 301; Same Case, 3 Sumner, 358; Amis *v.* Smith, supra; Wayman *v.* Southard, supra.

⁵ 16 Pet. 309, 313.

this section of the act of 1828 (referring to the third section) adopted the forthcoming bond in Mississippi as a part of the final process of that State at the passage of the act. And we understand by the phrase 'final process' all the writs of execution then in use in the State courts of Mississippi which were properly applicable to the courts of the United States; and we understand the phrase 'the proceedings thereupon,' to mean the exercise of all the duties of the ministerial officers of the State, prescribed by the laws of the State, for the purpose of obtaining the fruits of judgments. And among these duties is to be found one prescribed to the sheriff, directing him to restore personal property levied on by him to the defendant, upon his executing a forthcoming bond, according to law, and the further duty to return it to the court forfeited, if the defendant fail to deliver the property on the day of sale, according to the condition of the bond. These are certainly proceedings upon an execution, and, therefore, the forthcoming bond must be regarded as part of the final process." So, likewise, proceedings under appraisement laws and laws exempting certain property from sale, when adopted, present parallel cases with the above.

§ 862. The requirement, in Texas, is that property about to be sold on execution must be appraised on the day of sale before it can be sold.

If the appraisement be made the day before, it is an irregularity, for which the sale is voidable, but *not void*, and, therefore, such sale will not be impeachable collaterally.¹

There is obviously good reason for appraisement on the day of sale, for sometimes a mere day gives rise to a great increase or diminution in the value of property.

§ 863. But it is otherwise where the officer abuses his trust by appointing as appraiser a near kinsman of the plaintiff, as where the execution debtor, from any cause, fails to appoint an appraiser of his lands, on which an execution levy and an *extent* is about to be made in satisfaction of an execution, and the officer holding the writ appoints a son-in-law of the creditor as such appraiser, and who acts as such. The proceeding is thereby avoided absolutely, as the law requires disinterested appraisers, which is held to mean not only that the person shall be free of

¹ Ayres v. Duprey, 27 Tex. 593.

pecuniary interest, but also from the bias of kindred influences and relationship.¹

XVI. SALES AT WHICH THE EXECUTION CREDITOR IS PURCHASER.

§ 864. In some of the States it is held that when the execution plaintiff is the purchaser, he is chargeable with all irregularities and omissions, and with full notice of all things militating against the validity of the sale. In contemplation of law he is not, where there are irregularities, a *bona fide* purchaser. He pays nothing.² If the sale be not valid he may be reinstated to his rights on his judgment. In the case cited in the note, of *Harrison v. Doe*, the irregularity was the selling without obtaining half the appraised value required by the appraisal law. How far this irregularity would have affected a stranger buying at the sale, the court say they pass over as not within the case; but hold the purchase of the execution creditor void for such cause in an action at law.

§ 865. By statute, in Indiana, if the execution creditor is the purchaser of the land at sheriff's sale on execution, and the judgment under which the sale is made be afterwards reversed, the sale is voided thereby;³ and likewise if it be reversed only in part, as for costs, where the sale was for the costs as well as for the debt.⁴ And so it is held, in Wisconsin.⁵ And on the other hand, the ruling, when he takes nothing, is in his favor. In Illinois it is held, upon general principles, that if the execution creditor purchase land at sale on his execution by a description so indefinite that he takes nothing

¹ *Wolcott v. Ely*, 2 Allen, 338, 340; *Fox v. Hills*, 1 Conn. 295; *Mitchell v. Kirkland*, 7 Conn. 229; *Johnson v. Huntington*, 13 Conn. 47.

² *Harrison v. Doe*, 2 Blackf. 1; *Simonds v. Catlin*, 2 Caines, 61; *Hayden v. Dunlap*, 3 Bibb, 216; *Stephens v. Dennison*, 1 Oregon, 19; *McLean Co. Bank v. Flagg*, 31 Ill. 290; *Keeling v. Heard*, 3 Head, 592; *Piel v. Brayer*, 30 Ind. 332; *Twogood v. Franklin*, 27 Iowa, 239. The same rule applies with equal force if the purchase is made by the attorney of the plaintiff. *Ibid.* But see, also, *Wood v. Moorhouse*, 1 Lans. 405, wherein every execution purchaser, including the plaintiff, is declared a *bona fide* purchaser.

³ *Hutchens v. Doe*, 3 Ind. 528; *Doe v. Crocker*, 2 Ind. 575.

⁴ *Hutchens v. Doe*, *supra*.

⁵ *Corwith v. State Bank*, 18 Wis. 560.

by the purchase, that, on application, the sale will be set aside and satisfaction vacated, and a new execution will be awarded.¹

§ 866. In other and numerous cases it is held that the plaintiff, as execution purchaser, is protected as a purchaser *bona fide*. In these cases, both in law and in equity, the execution plaintiff, as a general rule, when a purchaser at sheriff's sale in discharge of his own debt is protected to the same extent as third persons or strangers to the suit.²

§ 867. The courts hold that, "unless the equities of the adverse claimant are so strong and persuasive as to prevent the application of the rule, which indisputably obtains as to third persons," the purchaser will be protected. Such is the language of the court in *Butterfield v. Walsh*, 21 Iowa, 99.

In this same case, the court say further: "Defendant had not even a deed. But if he had and failed to record it, and plaintiff have no notice of it, then in the absence of equities such as we have referred to, it would have had no validity against him, and his title would prevail. And certainly defendant can occupy no better position, holding an equitable claim without any paper evidence of it, and without notice thereof to plaintiff."

§ 868. We have given the text of this case thus fully to show that the ruling of the court is fully up to the point that the execution plaintiff, when a purchaser, is protected to the full extent, if the proceedings are regular, as is a third person or stranger.³

§ 869. But it is also held in Iowa, however, that an execution plaintiff who buys at sheriff's sale on the execution in his favor, after an appeal is taken from the judgment on which his execution emanates, and with a knowledge of such an appeal, although no supersedeas bond be filed, is not a *bona fide* purchaser.⁴ That if the judgment be reversed on such appeal, his title as execution purchaser fails. And that it is equally invalid in the hands of his grantees, who buys after the reversal of the judgment. That such purchaser or his grantees does not come within the

¹ *Hughes v. Streeter*, 24 Ill. 647.

² *Butterfield v. Walsh*, 21 Iowa, 99; *Wood v. Chapin*, 13 N. Y. 509; *Evans v. McGlasson*, 18 Iowa, 150.

³ *Butterfield v. Walsh*, *supra*; *Wood v. Moorhouse*, 1 Lans. 405. See, also, *Butterfield v. Walsh*, 36 Iowa, 534, decided at June term 1873, reaffirming this principle.

⁴ *Twogood v. Franklin*, 27 Iowa, 239.

provision of the Iowa Code, which declares that "property acquired by a purchaser in good faith, under a judgment subsequently reversed, shall not be affected by such reversal."¹

§ 870. Yet, where the execution plaintiff buys at his own execution sale, without notice of an appeal having been taken, and in the absence of any supersedeas bond, superseding the writ of execution, then, although the judgment be reversed on the appeal, yet if on a retrial of the case below, after it has been remanded, judgment again goes in favor of plaintiff for the full amount for which the sheriff's sale to him was made, his title (or the title of those claiming under him, if by him the property be conveyed away,) will be quieted on proper application made in equity.² The plaintiff having, by recovery of the second judgment fully substantiated the justice of the demand for which the sale was made, is no longer under any obligation to restore the land, or refund the amount for which it was sold, as he would have been had the judgment simply been reversed.³ But upon so quieting title to the property sold under the first judgment, equity ought, as a matter of course, to prevent the enforcement of the principal and interest of the latter judgment, upon the general principle of preventing a double satisfaction of the same demand.

§ 871. In Missouri, when the execution purchaser is a stranger, the sale will be valid although there be no notice of it, if the purchase be not in any manner connected with fraud or unfairness, and the price be an adequate one.⁴ But where, in the absence of notice of sale, the execution plaintiff is purchaser for a mere nominal consideration, the sale, if not void where there has been no confirmation, is nevertheless so wanting in equity, that the purchaser thereat will not be entitled to equitable relief to remove an alleged fraudulent conveyance from the execution debtor, to a third person, and which stands in the way of the purchaser at the execution sale.⁵

¹ Code of Iowa of 1873, p. 518, Sec. 3199.

² Frazier *v.* Crafts, 40 Iowa, 110.

³ Ibid.

⁴ Draper *v.* Bryson, 17 Mo. 71; Curd *v.* Lackland, 49 Mo. 451; Groner *v.* Smith, 49 Mo. 318; and Cooper *v.* Reynolds, 10 Wall. 308.

⁵ Curd *v.* Lackland, supra. And notice by handbills only, where the law requires advertisement in a newspaper, is *no notice*. Ibid.

XVII. SALES MADE AFTER THE RETURN DAY OF THE EXECUTION.

§ 872. If the levy be made before the return day of the writ, the officer may sell afterwards on the same writ without a renewal of process.¹

§ 873. It is immaterial to the purchaser as to the validity of the sale, whether the sale be made before or after the return day; or at what time the return is made; or whether the return be correct or incorrect; or whether any return be made at all, if the writ really be levied before the return day mentioned therein.² “It is not the return of the officer that gives title to the purchase, but the sale,” say the court, in *Remington v. Linthicum*.³

XVIII. SALES TO THIRD PERSONS, BONA FIDE PURCHASERS.

§ 874. Whether a *bona fide* purchaser at execution sale, he being a third person, and not the execution plaintiff, and buying without notice, will take the estate free from unrecorded deeds and prior equities, the same as an ordinary purchaser for value by private contract without notice, is a question upon which there is some conflict of authorities. But the later and better doctrine is that the execution purchaser takes the property against all such claims of which he has no notice.⁴

The general rule has been extended further, and the prevailing doctrine is, as has been seen, that the sale is equally valid as in favor of a purchase by the execution creditor.⁵

¹ *Remington v. Linthicum*, 14 Pet. 84, 92; *Wheaton v. Sexton*, 4 Wheat. 503; *Childs v. McChesney*, 20 Iowa, 431; *Stewart v. Severance*, 43 Mo. 322; *Stein v. Chambliss*, 18 Iowa, 474; *Phillips v. Dana*, 4 Ill. 551; *Wood v. Colvin*, 5 Hill, 231.

² *Remington v. Linthicum*, *supra*; *Wheaton v. Sexton*, *supra*; *Stewart v. Severance*, *supra*; *Barney v. Patterson*, 6 Har. & J. 204.

³ 14 Pet. 84, 92; *Wright v. Howell*, 35 Iowa, 288.

⁴ *Butterfield v. Walsh*, 21 Iowa, 97, 99; *Parker v. Pierce*, 16 Iowa, 227, 233; *Waldo v. Russell*, 5 Mo. 387; *Jackson v. Chamberlain*, 8 Wend. 620; *Den v. Richman*, 1 Green L. (N. J.) 43; *Ins. Co. v. Ledyard*, 8 Ala. 866; *Orth v. Jennings*, 8 Blackf. 420; *Heister's Lessee v. Fortner*, 2 Binney, 40; *Kellarn v. Jansson*, 17 Penn. St. 467; *Wood v. Chapin*, 13 N. Y. 509; *Borden v. Tillman*, 39 Tex. 262. But execution sales by State officers in Texas, during proceedings in bankruptcy of the execution debtor, in the United States courts, are void. The proceedings in bankruptcy suspend the power of the State court over the subject matter involved in bankruptcy. *Stemmons v. Burford*, 39 Tex. 352.

⁵ *Wood v. Moorhouse*, 1 Lans. 405; and ante Sec. 868 and note.

§ 875. In Mississippi, the execution purchaser stands in the place of the execution defendant, and takes such title in the land, and only such as the defendant had at the date of the judgment, subject to prior equities, or as may have come to the execution defendant after judgment and before levy; but in that event subject to such equities, if any, as affected the same in the possession of the execution debtor.¹ The judgment, though a lien on the land of the debtor, confers no interest therein, or estate whatever on the creditor. It only gives a right of priority as to satisfaction out of the land, as against subsequent adverse claims or liens.² Such execution is postponed as to all prior liens, of which at the sale or before payment of purchase money he had notice, and is therefore postponed as to the vendor's existing lien, if he has knowledge thereof.³ But is protected as against all equities and liens of which he has no notice.⁴

§ 876. In South Carolina, if the sale be to a *bona fide* purchaser, it will not be avoided or affected by omission of the officer to give the requisite notice, provided the purchaser be in nowise responsible for or implicated in causing the omission;⁵ and so of an imperfect description in the notice of the property to be sold;⁶ and where the advertisement was of *two stores*, and the sale and sheriff's deed was for two store houses and the ground whereon situated, it appearing to have been sufficiently understood that the houses and ground intended were those sold and conveyed by the deed, the sale was held to be valid.⁷

§ 877. Though there be extrinsic facts militating against the correctness or validity of an execution sale, yet if the purchaser thereat be a stranger, and buys and pays in ignorance thereof, and the execution emanates from a valid judgment, such purchaser will not be affected by such facts. He is a *bona fide* purchaser, and the sale will be sustained.⁸ And if a proceeding be instituted to vacate the sale, and it be not alleged or proven that

¹ Bell *v.* Flaherty, 45 Miss. 694; Lambeth *v.* Elder, 44 Miss. 88.

² Walton *v.* Hargroves, 42 Miss. 18.

³ Ibid.

⁴ Lambeth *v.* Elder, 44 Miss. 80, 87.

⁵ Baily *v.* Baily, 9 Rich. Eq. 892.

⁶ Ward *v.* Cohen, 8 Rich. (N. S.) 338.

⁷ Ibid.

⁸ Reeve *v.* Kennedy, 43 Cal. 643.

the purchase was made with notice of the objectionable circumstances, it will in law be presumed that he was ignorant thereof.¹

§ 878. And it is held in Indiana that a purchase at sheriff's sale by one who pays his own money, and buys without fraud, and has not prevented others from bidding on the property, is not, in respect to the purchase, a trustee of the debtor, although he represents, when buying, that he is buying for the benefit of the execution debtor. That such a state of the case in Indiana is within the statute of frauds; but if no one is deterred from bidding, and no wrong done the debtor or creditors, or deceit practiced, the sale will be maintained.²

XIX. VOID EXECUTION SALES.

§ 879. If the court from which the writ emanates has not jurisdiction of the subject matter of the judgment, then the execution sale is void. The purchaser takes no title. The officer having none himself, he is therefore incompetent to confer title by transfer to another.³

§ 880. So a sale made on process issued on a void judgment,⁴

¹ Reeve *v.* Kennedy, 43 Cal. 643.

² Minot *v.* Mitchell, 30 Ind. 228; Browne on Stat. of Frauds, Secs. 92, 95. But it has been held that purchasing under a pretense of buying for the benefit of the execution debtor is just cause for setting the sale aside. McHew *v.* Booth, 42 Mo. 189; Grumley *v.* Webb, 44 Mo. 444.

³ Albee *v.* Ward, 8 Mass. 79; Miller *v.* Handy, 40 Ill. 448. In Miller *v.* Handy, plaintiff claimed under execution sale; the judgment on which the execution issued was held void, for that there was no personal service, and the sale conferred no title. The rule in Illinois seems to be that the return of personal service must show how service was made, the time of service, and on whom served. Botsford *v.* O'Conner, 57 Ill. 72.

⁴ Albee *v.* Ward, supra; Wright *v.* Boon, 2 G. Greene, 458; Hollingsworth *v.* Bagley, 35 Tex. 345; Harshey *v.* Blackmarr, 20 Iowa, 161. In this last case the validity of an execution sale under a special foreclosure of a mortgage was involved. In the foreclosure proceedings under which the sale on execution was made, there was neither active nor constructive service on, nor voluntary appearance of the defendant debtor; but an unauthorized and insolvent attorney entered an appearance in his behalf. In a proceeding to vacate the sale, the court held, that the judgment being void, the sale was a nullity and conferred no title. So in Webster *v.* Reid, 11 How. 459, the Supreme Court of the United States say: "These suits were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory, or not, does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this

from whatever cause the judgment is void, is also void. So, also, if the sale be made on a forged execution.¹ Or on an execution otherwise valid, but enjoined.² Or on an original execution issued after defendant's death, the judgment not having been revived.³

§ 881. But though a sale of lands upon a void execution is void, when made on it alone, yet if at the same time the sale be made on one or more writs that are valid, the officer selling on the several writs together, the title of the purchaser will be sustained.⁴ Otherwise in Indiana.⁵

§ 882. In Missouri, a sale of lands on an execution which had been amended and altered by the clerk, after it had been issued and delivered to the sheriff, was held to be void where the execution plaintiff was the purchaser.⁶ But, *quare?* if the sale would have been void if made to a stranger to the execution without notice to him of such alteration.⁷

§ 883. A levy of "all the unsold land" in a given tract is void for uncertainty of description, and a sale under such levy is likewise void, and confers no title or rights upon purchasers.⁸

§ 884. The identity of lands sold on execution must be shown to a reasonable certainty.⁹

§ 885. The unassigned right of dower is not the subject of execution sale; and if it were, the sale of a given number of

case there was no personal notice, nor an attachment or other proceedings against the land until after the judgments. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold."¹⁰

¹ Silvan *v.* Coffee, 20 Tex. 4.

² Morris *v.* Bradford, 19 Geo. 527.

³ Scammon *v.* Swartwout, 35 Ill. 326; Erwin *v.* Dundas, 4 How. 58; Cartney *v.* Reed, 5 Ohio, 221; Leiper *v.* Thomson, 60 Penn. St. 177; Sample *v.* Barr, 25 Penn. St. 457.

⁴ Herrick *v.* Graves, 16 Wis. 157.

⁵ Brown *v.* McKay, 16 Ind. 484; Hutchens *v.* Doe, 3 Ind. 523; Clark *v.* Watson, 2 Ind. 400; Harrison *v.* Stipp, 8 Blackf. 458.

⁶ Trigg *v.* Ross, 35 Mo. 165.

⁷ Ibid.

⁸ Huddleston *v.* Garrott, 3 Humph. 629.

⁹ Pound *v.* Pullen, 3 Yerg. 338; Clemens *v.* Rannells, 34 Mo. 579; Hart *v.* Rector, 7 Mo. 531; Childs *v.* Ballou, 5 R. I. 537; Gales *v.* Christy, 4 La. Ann. 293; Gaines *v.* The Merchants' Bank, 4 La. Ann. 369; Marine *v.* Mourrain, 5 La. Ann. 133. And a levy and sale of all the execution debtor's rights and title, claim and demand, in realty, is void for uncertainty. See the cases cited in this note from Louisiana.

acres, to be taken off of a certain side of the dower land, prospectively to be assigned, is void for uncertainty. It has no identity until set off, and the subsequent assignment of dower can not make that valid which was invalid at the time the sale was made.¹

§ 886. A levy and sale of land on execution described only as a "tract containing" a certain number of acres, more or less, being a part of a tract granted to a certain person in such levy, sale, and deed named, is void for uncertainty, and so is a deed by the officer made thereon. For, though as between individuals in a private transaction, it might possibly pass an interest capable of being ascertained or reduced to a certainty by a judicial proceeding, yet as such aid is not usually given to deeds on execution sales, the sale is void for uncertainty.²

§ 887. If judgment be against an infant defendant, and the execution issue against the estate of the next friend of such infant, and sale be made thereon, the sale is void and the purchaser takes nothing.³

§ 888. A levy and sale made after the official term of the officer expires, and when his official power has ceased, or after his removal from office, is simply void.⁴ But otherwise if the writ be levied by him before his office ceases in either manner above named, and only the sale be made after the termination of his office.⁵

§ 889. By act of Congress it is provided that when a United States marshal goes out of office, a new writ of execution issues to his successor, who is to proceed as the former marshal would have proceeded in law if he had remained in office, and thus complete the levy and sale.⁶

§ 890. The writ of execution being the only authority of the officer to sell, it follows that if the writ is satisfied, or is based on a satisfied judgment, he has no power to sell, and that if a sale be made after such satisfaction it will be void.⁷

¹ Shields *v.* Batts, 5 J. J. Marsh. 13.

² Clemens *v.* Rannels, 34 Mo. 579; Childs *v.* Ballou, 5 R. I. 537.

³ Wilson *v.* McGee, 2 A. K. Marsh, 601.

⁴ Bank of Tennessee *v.* Beatty, 3 Sneed, 305.

⁵ Larned *v.* Allen, 13 Mass. 295; Wheaton *v.* Sexton, 4 Wheat. 503; Ferguson *v.* Lee, 9 Wend. 258, 260.

⁶ Stewart *v.* Hamilton, 4 McLean, 534.

⁷ Hunter *v.* Stephenson, 1 Hill, (S. C.) 415; Weston *v.* Clarke, 87 Mo. 568;

§ 891. But a sale to a *bona fide* purchaser will not be void by reason of the writ or judgment being only in part satisfied, where no evidence of such part satisfied accompanies the writ, and none was apparent on the record of the judgment.¹ In case of part satisfaction, if the land be sold for the whole original amount of the judgment, and the execution plaintiff be the purchaser, then, on bill filed in equity to set aside the sale, after possession and improvements by the purchaser, equity will compel a reconveyance of a proportionate part of the land to the execution debtor.² But in *Knight v. Applegate*,³ where a large portion of the judgment was satisfied on the judgment record, and the clerk issued execution for the whole amount of the judgment without noting the credit on the writ, or otherwise giving the sheriff notice thereof, by reason of which the sheriff raised the whole amount by sale of land, the court held that the sale was void. There was in reality no judgment to sustain the execution. The two amounts were different, whereas they should correspond. The true amount of the judgment at the time of issuing execution was the unpaid balance thereof, and that amount only of the original judgment the execution should have commanded the officer to make.

§ 892. As to the effect of an execution sale to a *bona fide* purchaser, when the judgment was fully satisfied previously to the issuing of the writ, and the purchaser buys ignorant of such satisfaction, and nothing appears of record as notice thereof, the authorities are at variance, but the better opinion seems to be that such sale is void, and confers no title on the purchaser.

§ 893. The sale held invalid in *King v. Goodwin*, 16 Mass., was one in which the creditor first caused the arrest, imprisonment and voluntary discharge of his judgment debtor; then finding land on which to levy, issued a *pluries* execution, on which the land was extended. Upon trial of the right under the extent, the court held that the voluntary discharge of the

Chiles *v.* Bernard, 3 Dana, 96; State *v.* Salyers, 19 Ind. 432; Laval *v.* Rowley, 17 Ind. 36; Splahn *v.* Gillespie, 48 Ind. 397, 412; Myers *v.* Cochran, 29 Ind. 256; King *v.* Goodwin, 16 Mass. 63; Hammatt *v.* Wyman, 9 Mass. 138; Mouchat *v.* Brown, 3 Rich. L. 117; Neilson *v.* Neilson, 5 Barb. 565; McClure *v.* Logan, 59 Mo. 234.

¹ Walker *v.* McKnight, 15 B. Mon. 467, 476, 477.

² Ibid.

³ 3 T. B. Mon. 336.

debtor was a satisfaction of the judgment; that the *pluries* writ afterwards issued thereon was therefore void, and that no right or title passed by the extent.¹

The same principle should apply, it would seem, to a sale as to an extent, made upon a satisfied judgment. If not good to pass a title for a term of years it ought not be good to pass the fee.

§ 894. In *Wood v. Colvin*, in New York, it was held that a purchaser at sheriff's sale, under a satisfied judgment, buying with knowledge, acquired no title as against a purchaser under a junior unsatisfied judgment, and that his assignee or vendee occupied no better position. That if satisfied the power to sell ceased; such, too, it is believed, is the general rule; for who buys under a power buys at his own risk.²

§ 895. And in *Swan v. Saddlemire*,³ Justice SUTHERLAND says: "I am strongly inclined to the opinion that an execution issued upon a judgment which has been paid and satisfied, is to be considered absolutely void, and not voidable, and that the purchaser under such execution would acquire no title. It is a general rule that a purchaser under a power purchases at his peril. If there was no subsisting power or authority to sell, no title is acquired. But I abstain from a definitive opinion upon this point because I do not deem it necessary to the decision of this motion, and it may hereafter directly arise between other parties connected with this transaction."

§ 896. Again in *Wood v. Colvin*,⁴ the court say: "If a purchaser can acquire a title under a satisfied judgment, it must be on the ground that there has been some fault on the part of the judgment debtor. If he stands by without taking any measures to arrest the sale, and without giving notice of the payment, and suffers a purchaser in good faith to part with his money, he may be estopped from afterwards alleging the payment to defeat the title of the purchaser."

§ 897. But such would not be the case if the purchaser him-

¹ King *v. Goodwin*, 16 Mass. 63.

² Wood *v. Colvin*, 2 Hill, 566; Sherman *v. Boyce*, 15 Johns. 443; Jackson *v. Anderson*, 4 Wend. 474; Lewis *v. Palmer*, 6 Wend. 367; McGuinty *v. Herrick*, 5 Wend. 240; Swan *v. Saddlemire*, 8 Wend. 676, 681; Neilson *v. Neilson*, 5 Barb. 565; King *v. Goodwin*, 16 Mass. 63; Mouchat *v. Brown*, 3 Rich. L. 117.

³ 8 Wend. 676, 681.

⁴ 2 Hill, 566, 568.

self knew the judgment was satisfied at the time of the purchase; having full notice thereof, the debtor would not be in fault by omitting to tell him what he already knew.¹

§ 898. The title, under execution sale, may not be impaired collaterally by parol proof, that the judgment was satisfied at the time execution issued. If such were the fact, it is to be made to appear in a direct proceeding set on foot for that very purpose. A judgment is of too high a dignity in law, to be made in such a case subject to such collateral attack.²

§ 899. In Illinois it is held that a sale made on a day prior to the day of sale designated by the notice, is absolutely void, not only as to the purchaser, but also as to his grantee with notice; and moreover, that if the plaintiff be the purchaser he is chargeable with notice of such irregularity.³

§ 900. In Missouri, it is held that a levy and execution sale of a tract of land as an entirety, by its original description, after it was subdivided into lots, streets and alleys, and sales of lots made to other parties, was void and conferred no title on the purchaser.⁴

§ 901. In Kentucky it is well settled by repeated decisions, that if the sheriff sell on execution a material quantity of land more than is required to satisfy the writ, when the land is susceptible of division, he exceeds his authority and the sale is void.⁵

§ 902. And so, if the writ calls for one sum and the judgment for another and different one, a sale on such writ is void unless the difference is so small as to come within the principle "*de minimis non curat lex;*" and the transfer of the property to a *bona fide* purchaser, by the purchaser under the execution will not alter the case.⁶

§ 903. So an execution sale of real estate, based on a proceeding *in rem* by attachment levied on real estate of a non-res-

¹ *Wood v. Colvin*, 2 Hill, 566, 568; *Myers v. Cochran*, 29 Ind. 256. In this last case, the purchaser, who had made payment, and refused repayment, with a knowledge that the judgment was satisfied, took nothing by his purchase.

² *Nichols v. Dissler*, 29 N. J. L. 293; *Same v. Same*, 31 N. J. L. 461.

³ *King v. Cushman*, 41 Ill. 31.

⁴ *Henry v. Mitchell*, 32 Mo. 512.

⁵ *Stover v. Boswell*, 3 Dana, 233; *Patterson v. Carneal*, 3 A. K. Marsh. 619; *Davidson v. McMurtry*, 2 J. J. Marsh. 68; *Morrison v. Bruce*, 9 Dana, 211; *Adams v. Keiser*, 7 Dana, 208; *Shropshire v. Pullen*, 3 Bush, 512.

⁶ *Hastings v. Johnson*, 1 Nev. 613.

ident owner, was held to be void where it appeared from the record that there was no personal service nor newspaper publication, or mailing of notice and petition to defendant as required by statute, and no evidence appeared of defendant's residence being unknown, or that it could not be ascertained.¹

§ 904. The statute in Illinois allows execution to issue against the lands of a decedent, on a judgment rendered in his life time, by first giving a certain notice to the executor or administrator; the Supreme Court of the United States, as also the Supreme Court of Illinois, hold that such statutory remedy is cumulative, and does not prevent a resort to the common law remedy of *scire facias* to revive the judgment. But that an execution issued without either such notice or revival by *scire facias* against lands of a decedent is a nullity, and all proceedings under it are void.²

§ 905. Such judgment, on the death of the defendant, (says Justice SWAYNE,) "survives only for the preservation of its lien, and as a basis of future action." It has no practical vitality for enforcement by the mere issuance of an execution. The notice provided by the statute, or else its alternative process of revival by writ of *scire facias* must be resorted to, and is indispensable to give the judgment such vitality as will sustain an execution and sale thereon.³

§ 906. In a proceeding bringing in question the title of a purchase under sheriff's sale, made on execution issued after the death of the execution debtor, the burden of proof rests upon the purchaser at sheriff's sale, to show that the notice was given in compliance with the statute, or else a revival as at common law, by *scire facias*.⁴

§ 907. Where two parcels of land are included in one and the same mortgage, a separate execution sale of the right of redemption of one tract only, on execution against the mortgageor, is inoperative and void. It passes nothing to the purchaser. There is no rule by which redemption can be made of the one tract

¹ Hodson v. Tibbetts, 16 Iowa, 97; Broghill v. Lash, 3 G. Greene, 357; McGahen v. Carr, 6 Iowa, 331.

² Ransom v. Williams, 2 Wall. 318; Pickett v. Hartsock, 15 Ill. 279; Brown v. Parker, Id. 307; Finch v. Martin, 19 Ill. 111.

³ Ransom v. Williams, 2 Wall. 318; Pickett v. Hartsock, 15 Ill. 279; Brown v. Parker, Id. 307; Finch v. Martin, 19 Ill. 111.

⁴ Ransom v. Williams, 2 Wall. 318.

alone, and the execution purchaser has no claim to redeem the other tract which is not included in his purchase.¹

§ 908. If an order of sale on execution issued to an officer be without a seal, when by the law of the land a seal is required, it is invalid, and a sale of lands made in virtue thereof is void; the purchaser takes nothing.² So, in Indiana, a sheriff's sale of sev-

¹ Webster v. Foster, 15 Gray, 31; Johnson v. Stevens, 7 Cush. 431, 435.

² Ins. Co. v. Hallock, 6 Wall. 556. This case arose under the local code of Indiana, which provides that the execution is in all cases the remedy on a money judgment, and that it shall be sealed with the seal of the court. "In courts which pursue the chancery practice in foreclosing mortgages unaffected by statutory provisions, the sale is made by a commissioner appointed by the court. This is usually one of the standing master commissioners of the court, or, for reasons shown, some special commissioner for that purpose. In neither case does any process, or order, under the court, issue to the commissioner. He may, if he thinks proper, procure a copy of the decree and order appointing him commissioner, or if the party who wishes the decree executed thinks proper in this mode to demand of him to proceed, he may furnish him with a copy. But it is believed that the decree itself is the authority on which the commissioner acts, and if he proceeds in conformity to the decree, the sale will be valid, although no copy has been placed in the hands of the commissioner. In the courts of Indiana, the distinction between common law and chancery proceedings is abolished, and under their code of civil procedure but one form of action, called a civil action, is known. This code provides, Sec. 407, that 'when a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced by execution.' Sec. 409 says: 'The execution must issue in the name of the State and be directed to the sheriff of the county, sealed with the seal and tested by the clerk of the court.' Sec. 635, which relates to the proceedings to foreclose a mortgage, we give *verbatim*: 'A copy of the order of sale and judgment shall be issued and certified by the clerk, *under the seal of the court*, to the sheriff, who shall thereupon proceed to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest and costs, *as upon execution*; and if any part of the judgment, interest and cost remain unsatisfied, the sheriff shall forthwith proceed to levy the residue of the other property of the defendant.' Though the order of sale here described may not come under the name of any of the recognized common law writs of execution, as *capias, fieri facias*, or others, yet it comes clearly within the function and supplies the purpose of an execution — that is a process issuing from a court to enforce its judgment. The statute recognizes it as such, and requires that it shall issue under the seal of the court. The sheriff to whom it is directed is required to proceed '*as upon execution*.' If the debt is not satisfied by the sale of the property specifically mentioned in the order, it then operates as a *fieri facias*, under which the sheriff is directed to levy the residue of any other property of the defendant. It is, therefore, to all intents and purposes an execution, and the statute expressly requires that it must issue *under the seal of the court*. Without the seal it is void. We can not distinguish it from any other writ or process in this particular. It is equally clear

eral parcels of land, all together *in solido*, not having first offered each separately, is absolutely void.¹

§ 909. Where the mode and form of proceedings in the highest courts of common law of a State are adopted as the practice in the United States courts of any district, a United States marshal's sale on execution, in such district, made otherwise than in accordance with such common law practice of said State courts, is invalid and will not confer title on the purchaser. A departure in such case from the local law and practice requiring an appraisement of the property to be sold, and inhibiting sale for less than a named proportion of the appraised value, avoids the sale.²

§ 910. A judgment *in personam* without jurisdiction of the person of defendant, is a void judgment, and an execution sale thereon is also void. He who redeems from such sale as a judgment creditor takes nothing by his redemption; and an execution sale of the premises, made under the statute of Illinois, at the instance of the redemptioner and in pursuance of such redemption, is also void, and will be so regarded even in collateral proceedings.³

§ 911. If a sale be merely irregular, or on irregular process, it is voidable only; but if made without authority, it is void.

In *St. Bartholomew's Church v. Wood*⁴ the rule laid down in Pennsylvania is declared to be "that a sheriff's sale on a *ft. fa.* without a waiver of inquisition is void as wanting authority, and is not confirmed by the acknowledgment of the deed, or the distribution of the proceeds of sale." And as to mere irregularities, the court add, in this case, that "the acknowledgment of the sheriff's deed cures irregularities on the process or proceedings, but not a want of authority to sell." But this acknowledgment is not to be understood to be the mere acknowledgment *in pais*

that under the Indiana statute the sheriff could not sell without this order, certified under the seal of the court, and placed in his hands. This is his authority, and if it is for any reason void, his acts purporting to be done under it are also void."

¹ *Tyler v. Wilkerson*, 27 Ind. 450.

² *Smith v. Cockrill*, 6 Wall. 756.

³ *Johnson v. Baker*, 38 Ill. 98.

⁴ 61 Penn. St. 96, 103. See also *Baird v. Lent*, 8 Watts, 422; *Wolf v. Payne*, 85 Penn. St. 97; *McLaughlin v. Shields*, 12 Penn. St. 283, 289; *Shoemaker v. Ballard*, 15 Penn. St. 92, 94; *McFee v. Harris*, 25 Penn. St. 102; *Shields v. Miltenberger*, 14 Penn. St. 76.

of the officer. In Pennsylvania, it is an act in court, and its reception is a judicial act.¹ Hence, in *McFee v. Harris*,² the court say: "After acknowledgment of the sheriff's deed in open court, the title of the sheriff's vendee can not be affected by mere irregularities, however gross; nothing but fraud in the sale, or want of authority to sell, can defeat the title."

§ 912. This mode of taking the acknowledgment of a sheriff's deed, in open court, in Pennsylvania, operates as confirmation of the sale, so as to assimilate such sales in that State, and in that respect, to a certain extent, to judicial sales, as has elsewhere been stated; but while such is the case, it does not seem to give validity to a sale made without authority of law, which otherwise would be void. Nor would it in a judicial sale.³

§ 913. A judgment *in personam*, on service by publication and no personal service of process whatever, is void, when rendered by default, there being no appearance of the defendant; and whenever on such judgment an ordinary writ of *fieri facias* issues and property is sold thereon, the sale is void, and the execution purchaser takes nothing thereby. Such a proceeding is not "due process of law." Instead of a general judgment *in personam* the creditor should proceed by attachment so as to obtain jurisdiction over the property, and should take judgment against the property specifically and an order of sale thereof. A sheriff's sale and deed on the judgment *in personam* is of no effect and may be impeached in a collateral proceeding.⁴

§ 914. A purchase at an execution sale, made with intent to defraud, hinder, or delay the creditors of the execution debtor, is fraudulent and void as against all *bona fide* creditors or other execution purchasers of such debtor.⁵

§ 915. The execution and judgment must correspond as to the character of the parties. A recovery of judgment by one in his character of administrator will not support an execution in his favor describing him only in his individual character, with-

¹ *Thompson v. Phillips*, 1 Bald. C. C. 272.

² 25 Penn. St. 102; *St. Bartho'omew's Ch. v. Wood*, 61 Penn. St. 96, 103.

³ *Shriver v. Lynn*, 2 How. 43, 59, 60; *Thompson v. Phillips*, 1 Bald. C. C 246, 272. See also the Chap. on Void Judicial Sales.

⁴ *Abbott v. Sheppard*, 44 Mo. 273; *Smith v. McCutchen*, 38 Mo. 415; *Lati-mer v. Union Pacific R. R. Co.*, 43 Mo. 105; *Wood v. Stanberry*, 21 Ohio St. 142.

⁵ *Duncan v. Forsythe*, 3 Dana, 229.

out the addition of administrator. The writ will be void, and so whether the judgment and writ be against or in favor of an administrator. The execution, in either case, must correspond with the judgment as to the names and character of the parties.¹

§ 916. So, a sale of a given quantity of land out of a specified tract, without identity or description of the land sold, is void.²

§ 917. As well at common law as by the statute, a sale, in Indiana, of lands of a decedent can not be made upon an execution, which is issued on a judgment rendered against the executor; and if the semblance of it be carried out, it will confer no title. It will be void.³

§ 918. And so a sale of lands made on an execution and judgment against two defendants, one of whom is dead, is void, if the execution bear *teste* of a date subsequent to the death of one of them.⁴

§ 919. "If a bidder make representations to deter other bidders and is successful in deterring them, his purchase is fraudulent and void,"⁵ and will be set aside.

§ 920. Execution sale of the right land, on a right levy, is not affected by error in the advertisement of the sale as to description of the land, where the buyer knows, at the time of buying, what land he is getting, although the error of description be carried into the officer's deed. Equity will correct the deed, if the purchaser be a *bona fide* one.⁶

§ 921. The execution must substantially conform to the judgment; and if there be no judgment, or the execution be for a sum larger than the supposed judgment, a sale thereon is void.⁷

§ 922. After return day of the *fieri facias*, if there be a levy of land, yet no sale, there should then be issued a writ of *venditioni exponas*, by order of the court.⁸

¹ Palmer *v.* Palmer, 2 Conn. 462.

² Peck *v.* Mallams, 10 N. Y. 509; Clemens *v.* Rannells, 34 Mo. 579.

³ Doe *v.* Woody, 4 McLean, 75.

⁴ Erwin *v.* Dundas, 4 How. 58.

⁵ Vantrees *v.* Hyatt, 5 Ind. 487; Hogg *v.* Wilkins, 1 Grant's Cas. 67; Bunts *v.* Cole, 7 Blackf. 265.

⁶ Steward *v.* Pettigrew, 28 Ark. 372.

⁷ Hightower *v.* Handlin, 27 Ark. 20; Hastings *v.* Johnson, 1 Nev. 615.

⁸ Hightower *v.* Handlin, *supra*; Towns *v.* Harris, 13 Tex. 507; Young *v.* Smith, 23 Tex. 598.

§ 923. The execution purchaser takes only the title of the debtor. When that comes in question, the burden of proof is on him to show what title the execution debtor had subject to the judgment and execution under which the sale is made.¹ And if the execution debtor has conveyed away the land by a deed yet unrecorded, the execution purchaser takes subject to such deed, and is postponed in his purchase in favor thereof, if at the time of purchase he had notice of the circumstances and facts as to the unrecorded deed.²

§ 924. At common law, a judgment note executed by the wife with the husband, as security for the latter, is void, and so is a judgment entered thereon; and an execution sale under the same of the separate real estate or lands of the wife as a sequence thereto is void also. She has no power to make such note; and although under the statutes of Illinois a wife may make valid contracts in reference to her own separate property, yet the rule of the common law is not thereby altered so as to give her capacity to bind herself otherwise by contract during her coveture.³ Being thus void, they will be set aside in equity as a cloud upon the wife's title.

§ 925. A void judgment or decree, and execution sale thereunder confers no right, but the sale is simply void; and so of a sale on a void execution. As a sequence thereto, a redemption therefrom by another judgment creditor is also void, and the redemptioner takes nothing. The person redeeming is bound to take notice whether or not the court rendering the judgment or decree under which the sale was made, from which he seeks to redeem, had jurisdiction to pronounce the same. For it is a familiar principle, as we have elsewhere seen, that if the court had not jurisdiction, its action, and all proceedings based thereon, or under the same, are null and void; and therefore a party redeeming under such circumstances acquires no title to the land by virtue of such redemption.⁴

§ 926. And if a final decree of confirmation is made of a master's sale at one term, so that the cause goes off the docket, and is no longer pending in court, then, if at a subsequent term,

¹ Tuley v. Ready, 27 Ark. 98.

² Ibid.; Byers v. Engles, 16 Ark. 543.

³ Doyle v. Kelly, 75 Ill. 574.

⁴ Mulvey v. Carpenter, 78 Ill. 580; Borders v. Murphy, Id. 81; Clingman v. Hopkie, Id. 152.

it be reinstated, and proceedings had therein, without notice to the adverse party in interest, such subsequent proceedings are void for want of jurisdiction of the party in interest, against whom or against whose interest such proceedings are had, and can not be enforced; and if the proceedings are in the nature of a judgment or decree, they are equally void, and so is any writ of execution or sale on the same which may issue thereon or in pursuance thereof.¹

Thus, where, after a decree of foreclosure of a mortgage and a sale thereon, there being a deficiency of the proceeds of sale to pay the debt, the court awarded execution for the unpaid balance at a subsequent term, without bringing the party so proceeded against again into court, such execution and the sale made thereon were held to be void.²

§ 927. And a personal money judgment rendered against a defendant in a cause in which there is no personal service, is void; and, as a consequence, so is a general execution issued thereon. As, for instance, where service in an attachment proceeding is by *publication only*, and general judgment is rendered against the defendant, as also a judgment ordering the sale of certain lands which are attached, and after the sale thereof other lands which were not levied on by the writ of attachment, are levied and sold on a general execution issued upon the personal judgment, such subsequent sale is void.³

§ 928. If lands belonging to several owners in common be sold on execution as to all of the owners, and conveyance be made accordingly, while the levy and recitals in the deed to the purchaser show the sale and execution to have been made on a judgment and levy as against only two of them, no title whatever will pass as against the owner thus shown to have not been a defendant in the judgment, the execution, or levy. The interest of such third party does not pass, although his interest purports, by the deed, to have been sold with that of the others. In such case no authority whatever is shown for the sale of the party's interest who is not a judgment defendant. The sale as to such third party is void.⁴ And so an execution sale of lands made at the door of

¹ *Mulvey v. Carpenter*, 78 Ill. 580.

² *Ibid.*

³ *Morton v. Smith*, 2 Dillon, 316.

⁴ *Julian v. Boren*, 55 Mo. 110.

the court house during the session of the *County* Court, when, by the statute, such sale is required to be made at the door of the court house while the *Circuit* Court is in session, is void, where the fact that the sale was made while the *County* Court was in session, appears upon the face of the deed.¹ And such, too, is the case, whether the writ emanate from the State or from the United States court, and whether the sale be made by the sheriff or by the marshal of the United States.²

§ 929. Execution sales, made upon executions issued in Illinois within one year from the judgment debtor's death, and without the notice to the executor or administrator, or revivor by *scire facias* as is required by statute, are void.³

§ 930. If the judgment be liens on the real estate of the decedent, that is, if rendered in a court of record before the defendant's death, or being rendered in a justice's court, are, before the defendant's death, filed in the circuit court, in such cases they become liens on defendant's real estate, and execution may be had thereon, and the lands sold after defendant's death; but not until after the expiration of the one year, and a revivor by *scire facias*, or else three months' notice (not additional to the one year) to the executor or administrator, so as to afford them an opportunity to pay the same.⁴

§ 931. But a judgment obtained against an executor or administrator is not a lien on the decedent's lands, for the reason that the lands are vested (subject to debts) in the heirs, and not in the legal representatives. Nor are judgments liens, which are rendered by a justice of the peace, against a defendant, until filed in the circuit court, as provided by statute, and though rendered in a defendant's lifetime, yet if not so filed in the circuit court until after the defendant's death, they do not by such filing become liens on the lands, which are then vested in the heirs; and therefore execution and sale of lands on such judgments are void; for all judgments that are not liens must

¹ *Merchants' Bank of Mo. v. Evans*, 51 Mo. 335; *Bruce v. Leary*, 55 Mo. 431; *Jackson v. Magruder*, 51 Mo. 55; *McClurg v. Dollarhide*, 51 Mo. 347. And may be impeached collaterally. *Ibid.*

² *Bruce v. Leary*, supra; *Merchants' Bank of Mo. v. Evans*, supra.

³ *Pickett v. Hartsock*, 15 Ill. 279; *Brown v. Parker*, Id. 307; *Scammon v. Swartwout*, 35 Ill. 326; *Littler v. The People*, 43 Ill. 194; *Clingman v. Hopper*, 78 Ill. 152, 156.

⁴ *Ibid.*

take their chance for payment in probate, with other ordinary debts, and are entitled to no priority or preference.¹

§ 932. The several States have rightful control of the property of deceased persons within their respective limits. Therefore, where by law a sale of realty can not be made on execution from a State court against a deceased debtor whose effects are in the custody of the law, for administration, a creditor obtaining judgment in the United States Court, is in no better condition in that respect, and any sale made of the lands of the estate, on execution in such case, from the Federal court, is unauthorized and *void*.²

§ 933. A State law providing for the payment of all debts of a deceased person, in a certain order, by the administrator or executor, in and by order of the Probate Court, places the property of decedents in the custody of that court, and withdraws the property from the operation of the execution laws, and places it in the hands of the administrator or executor, as the case may be, for administration for the benefit of those entitled to the same, or the proceeds thereof.³

In such cases the law prescribes the manner of sale of lands in probate, if necessary for the payment of debts, and such property can be sold in no other way.⁴

§ 934. If the action be by attachment, and the proceeding be only *in rem* so that no personal judgment goes against the defendant, and the writ of attachment be not levied on property of the debtor, jurisdiction does not attach, and a sale of lands therein is void. To render such sale valid there must be a levy of the attachment on the land, as necessary to jurisdiction if there be no personal service. So a judgment against the person, as by default, is likewise void without personal service to bring defendant into court. Therefore whether the sale be by subsequent levy of execution, as proceeding on the personal judgment, or on the judgment (if one) *in rem*, as upon attachment

¹ Clingman *v.* Hopkie, 78 Ill. 152; Welch *v.* Wallace, 8 Ill. 490; Turney *v.* Gates, 12 Ill. 141; Paschall *v.* Hailman, 9 Ill. 285.

² Yonley *v.* Lavender, 21 Wall. 276; Williams *v.* Benedict, 8 How. 107; Bank of Tennessee *v.* Horn, 17 How. 157, 160.

³ Yonley *v.* Lavender, 21 Wal. 276; Williams *v.* Benedict, 8 How. 107; Bank of Tennessee *v.* Horn, 17 How. 157, 160.

⁴ Yonley *v.* Lavender, *supra*; Williams *v.* Benedict, *supra*; Bank of Tennessee *v.* Horn, *supra*.

against the land, it is in either case void, for to sustain the latter there should be service of the original writ of attachment to give jurisdiction to the court and place the property in the custody of the law, without which custody no judgment *in rem* is valid; and to sustain the former, as on a personal judgment and execution, and levy thereon, there must have been, to give validity to such judgment and writ, service on the defendant. For want of it, in either event, the proceedings are *coram non judice* and *void*.¹

XX. SALES WHEN DEFENDANT IS BANKRUPT.

§ 935. Where a debtor against whom there is judgment and execution in the State court, goes into bankruptcy before any levy is made of the execution, and the judgment itself is not in law a lien, then a subsequent levy and sale by the sheriff, under the State process, is of no validity to carry title as against the title emanating from the proceedings in bankruptcy; for the property passes to the bankrupt's assignee, and the proceeds thereof into general distribution.²

If, however, there be specific liens against the property of the bankrupt, as judgments which at law are liens, or mortgage liens, on which no levy has been made, at the time of inception of the bankrupt proceedings, their validity and priority are not affected by the proceedings in bankruptcy.³

§ 936. In such case the bankrupt court of the United States may, through its assignee, take possession of and sell the property clear of the liens, by the terms of sale, and the order thereof, and will, in such case, first apply a sufficiency of the proceeds to discharge such liens, or the proceeds as far as the same will go, and the excess, if any, goes into the general fund in bankruptcy.⁴ If, on the other hand, the bankrupt court thinks proper so to do, it may sell the property *subject* to the existing liens, and leave the purchaser to pay the same, and he will, in that case, take the property subject thereto, and the proceeds of sale will then go into the general fund in bankruptcy, leaving the lien-holder to look to and enforce his liens in the

¹ Bias *v.* Vance, 32 Miss. 198.

² O'Harrar *v.* Stone, 48 Ind. 417, 421.

³ Truitt *v.* Truitt, 38 Ind. 16, 27.

⁴ *Ibid.*

State court for satisfaction thereof.¹ And if the purchaser in bankruptcy fail in such case to discharge the liens, and the property be sold on execution, or judicially, by proceedings in the State court, the purchaser at the sale, in the latter proceedings, will take the title clear of the title obtained under the proceedings and sale in bankruptcy.²

§ 937. If, however, there be an existing valid levy, under a valid judgment in the State court, on an execution in the hands of the sheriff, from such court, at the time of the inception of the bankrupt proceedings, then the property, by virtue of the levy, is in the custody of the court from which emanates the writ of execution, and the proceeding in bankruptcy has no effect to release or discharge the same, or to take the property out of the hands or control of the sheriff; and it is his duty to carry the execution in his hands into effect by sale, and the purchaser will take title clear of any proceeding in bankruptcy, and his title will override title made under any sale of the same property in bankruptcy.³ If there be an excess over the liens and costs, it goes over into the court of bankruptcy.⁴

§ 938. So, when the levy under the State process, in the hands of the State officer, is made before the execution debtor is adjudged to be a bankrupt in the United States courts, then such prior levy fixes a lien upon the property in the hands of the officer, and it is the duty of the officer to go on and enforce it by sale of the property;⁵ and if he fail so to do, he will be liable to an action at the suit of the execution plaintiff for damages suffered by such breach of duty; for where there is a *final* judgment, and on an execution thereon the sheriff has seized the property, the simple *adjudication* in bankruptcy does not inter-

¹ *Truitt v. Truitt*, 38 Ind. 16, 27.

² *Ibid.*

³ *O'Harra v. Stone*, 48 Ind. 417; *Jones v. Leach*, 1 N. B. Reg. 595; *Davis v. Anderson*, 6 N. B. Reg. 145; *Hagan v. Lucas*, 10 Pet. 400; *Johnson v. Bishop*, 1 Woolworth, 324; *Taylor v. Carryl*, 20 How. 583, 584; *Pulliam v. Osborne*, 17 How. 471; *Peck v. Jenness*, 7 How. 612.

⁴ *O'Harra v. Stone*, 48 Ind. 417; *Jones v. Leach*, 1 N. B. Reg. 595; *Davis v. Anderson*, 6 N. B. Reg. 145

⁵ *Sharman v. Howell*, 40 Geo. 257; *Hagan v. Lucas*, 10 Pet. 400; *Peck v. Jenness*, 7 How. 612; *Pulliam v. Osborne*, 17 How. 471; *Taylor v. Carryl*, 20 How. 583, 584; *Johnson v. Bishop*, 1 Woolworth, 324.

fere with the proceedings. The assignee takes the property in such case, subject to the lien of the execution.¹

§ 939. So, likewise, as to homestead exemptions; going into bankruptcy does not affect them; and the rule of exemption prevails in the courts of the United States, under the laws of the respective States wherein the homestead exists, as in the State courts of such States.² The terms and extent of the exemption depend upon the local laws of the States; these will be administered accordingly in the courts of the United States.³

§ 940. Where, by the law of a State, homesteads may consist of leasehold estates, as well as of the fee, such leasehold homesteads will be respected by the United States courts in administering the laws in such State; and if the leasehold interest be of greater value than the amount in value allowed as homestead, a bankrupt court, in administering the affairs of the homestead debtor and bankrupt, will sell the homestead, and its owner will be entitled to a portion of the proceeds of sale equal to the amount exempt by law.⁴

§ 941. By virtue of the decree in bankruptcy, the property of the bankrupt passes to the assignee, although levied on or subject to a judgment lien from other courts. Yet, if it be not taken, nor placed into the legal custody of the United States court, the State tribunal and officer may carry out the levy proceedings, or enforce the lien, as the case may be, and thereby complete the title. Such is the ruling in the State courts of Georgia.⁵

¹ Sharman v. Howell, 40 Geo. 257.

² *In re Beckerford*, 1 Dillon, 45. In Nebraska, the entire dwelling house is exempt, although partly occupied for other purposes. *In re Tertelling*, 2 Dillon, 339.

³ *In re Beckerford*, 1 Dillon, 45.

⁴ Ibid.

⁵ Sharman v. Howell, 40 Geo. 257.

CHAPTER XVI.

THE DEED FOR LANDS SOLD ON EXECUTION.

- I. BY WHOM TO BE MADE.
- II. TO WHOM TO BE MADE.
- III. WHEN TO BE MADE.
- IV. WHAT PASSES BY IT.
- V. ITS RECITALS.
- VI. ITS RELATIONS.
- VII. PRIORITY.
- VIII. REGISTRATION.
- IX. COLLATERAL IMPEACHMENT.
- X. HOW FAR EXECUTION DEFENDANT IS ESTOPPED BY THE DEED.
- XI. MAKING TITLE UNDER EXECUTION DEED.
- XII. IN LAW, THE OFFICER IS REGARDED AS THE AGENT OF THE DEBTOR.

I. BY WHOM TO BE MADE.

§ 942. The deed can only be executed by the officer himself, or by his general deputy, and whether by the one or by the other, it must, in either case, be in the name of the principal officer, and as his act.¹

§ 943. A special deputy can not execute the deed; nor can a deputy execute the deed in his own name.²

§ 944. By statute in most of those States in which lands are sold on execution, instead of being extended, the deed may be made by the successor of the officer who sells, when such officer has, after the sale, ceased from any cause to exercise the functions of the office before executing a deed for the lands sold; and, even without such a statute, the court, in a proper case, will order the successor of the officer selling to execute the deed.³

¹ *Jackson v. Bush*, 10 Johns. 223; *Tillotson v. Cheetham*, 2 Johns. 63; *Haines v. Lindsey*, 4 Ohio, 88; *Jackson v. Davis*, 18 Johns. 7, 8; *Glasgow v. Smith*, 1 Overt. 144; *Carr v. Hunt*, 14 Iowa, 206; *Young v. Smith*, 10 B. Mon. 293; *Kellar v. Blanchard*, 21 La. Ann. 38.

² *Anderson v. Brown*, 9 Ohio, 151; *Lowes v. Thompson*, 3 Cal. 266; *Samuels v. Shelton*, 48 Mo. 444.

³ *Fowble v. Rayberg*, 4 Ohio, 45; *Woods v. Lane*, 2 S. & R. 53; *Prescott v. Everts*, 4 Wis. 314; *Conger v. Converse*, 9 Iowa, 556; *Thornton v. Boyd*, 25 Miss. 598; *Fretwell v. Morrow*, 7 Geo. 264; *McElmurray v. Ardis*, 3 Stroh. L. 212; *People v. Boring*, 8 Cal. 406; *Phillips v. Jamison*, 14 B. Mon. 466.

But in California the rule seems to be established that the individual officer selling shall execute the deed, even if his term of office has subsequently expired, and in case of his death, then by a master appointed by court.¹ In Ohio, Pennsylvania, and some others of the States, the practice is to confirm the sales in court;² and it has been held, where this practice prevails, that without confirmation sales on execution are invalid.³

In the leading case here cited, the court held that a "deed executed by the deputy sheriff, in the name and on the behalf of his principal, was a good execution of the deed." That a "sale, and the consummation of that sale by deed, are acts which the sheriff may do by deputy." That "the law does not require them to be done by the sheriff in person."⁴ This doctrine holds good to the present day.

§ 945. In Missouri, the law requires the sheriff's deed for property sold on execution to be acknowledged before the clerk of the court by the sheriff; a certificate of such acknowledgment to be endorsed by the clerk on the deed under the seal of the court, and a correct entry to be made of record by the clerk, describing the conveyance and the names of the parties to the suit, in which the judgment was rendered on which the execution issued.

It is held by the supreme court of that State that this provision of the statute is merely directory, so far as to the entry of record. That a purchaser having no control over the clerk can not be prejudiced by the omission, or by the irregularity of the entry, and that the deed will be good if the proper endorsement is made thereon, although the entry of record be substantially defective.⁵

§ 946. The deed must contain apt words of conveyance and grant, and though no particular form is required, it must substantially purport to grant and convey the premises to the purchaser, in consideration of the contract of sale and payment of the purchase money. In the language of the court, in *Johnson*

¹ *Anthony v. Wessell*, 9 Cal. 103; *People v. Boring*, 8 Cal. 406.

² *Curtis v. Norton*, 1 Ohio, 137.

³ *Ibid.*

⁴ *Jackson v. Bush*, 10 Johns. 223. The same ruling had been previously made in *Tillotson v. Cheetham*, 2 Johns. 63.

⁵ *Scruggs v. Scruggs*, 41 Mo. 242.

v. *Bantock*,¹ "it must appear, from the language employed, that it was the intention to convey the title, and the language must purport to have that effect."

We may also add that it must purport to be the act of the officer in his official capacity, and not merely the individual act of the man or person filling the office.

§ 947. However sufficient it may be to show that a purchase had been made at execution, and however sufficient as a mere certificate of purchase on which to base a deed, yet, unless it purport to transfer the land and convey the title, it will not be sufficient as a deed. In the case cited from Illinois, the instrument (a copy of which is given in the subjoined note,) instead of purporting to be a deed, really negatives such idea by the words "are *entitled* to a deed for the premises so sold."²

¹ 88 Ill. 111.

² See *Johnson v. Bantock*, supra, in which the instrument relied on as the deed was in words and figures as follows: "Know all men by these presents: That I have this day sold to Olof Johnson and Samuel Remington the following described tract of land to-wit: The southeast quarter of the northeast quarter of Section 29, in Township No. 14, north of Range 4, east of the fourth principal meridian in the County of Henry, in the State of Illinois. The above described land being the same that was sold to Joshua Johnson on execution in favor of B. F. Johnson, and against John J. Hall and Robert Duncan, on the 24th day of July, 1858, for the sum of \$195.42, and redeemed on the 24th day of October, 1859, by Olof Johnson and Samuel Remington, who were judgment creditors of the said John J. Hall and Robert Duncan, by paying to me good and lawful money, for said Joshua Johnson, the sum of \$218 69, it being the full amount of said judgment and interest up to that date, and no more; and I have advertised and offered the same for sale at public auction this 14th day of December, 1859, according to law; and the said Olof Johnson and Samuel Remington, by force of the statute in such case made and provided, were considered as having bid the sum of \$219.88, it being the amount of said redemption money so paid by Olof Johnson and Samuel Remington, and interest thereon from the day of such redemption up to the present time, and no more; and there being no bid greater than the said amount offered, the said lands were struck off and sold to said Olof Johnson and Samuel Remington, judgment creditors as aforesaid, at the said amount of redemption money and interest; and the said Olof Johnson and Samuel Remington are entitled to a deed for the premises so sold, to have and to hold the said described premises, with all the appurtenances thereunto belonging to the said Olof Johnson and Samuel Remington, their heirs and assigns, forever.

"Witness my hand and seal this 14th day of December, 1859.

[Duly acknowledged as a deed.]

[SEAL.]

"PURNELL H. SMITH,

"Sheriff of Henry County, Illinois."

Of this instrument the court say, that as a deed it "is not sufficient." 88 Ill. 111.

§ 948. In some States the officer who sells may execute the deed after his term expires.¹ This, too, though his successor may have entered on the duties of his office.²

§ 949. The certificate of sale and the deed should refer to or recite the writ on which the sale is made, and no other, although several writs be in the hands of the officer. But the full amount for which the property was sold should be stated.

The disposition of the money is matter for statement in the return.

The deed is good as between the purchaser and execution defendant, if made officially by the officer, although the certificate of acknowledgment be defective as to the official character of the person acknowledging it, and refer to him only by his personal name.³ And so it is good if made to the assignee of the purchaser, stated to be such in the deed by the officer.⁴

II. To WHOM TO BE MADE.

§ 950. The sheriff's deed may be made to the purchaser or to his assigns.⁵ Or, in case of the death of the purchaser, to his devisee,⁶ or legal heirs,⁷ as the case may be.

§ 951. The purchaser can assign his bid, and a deed from the sheriff to the assignee will be valid.⁸ So the purchaser may assign the sheriff's certificate of purchase where the practice is to give certificates, and the deed may be made to the assignee thereof.⁹

§ 952. But a recital of such assignment in the sheriff's deed is only *prima facie* evidence thereof, it being the act of a third person, and not of the sheriff.¹⁰

¹ Lemon *v.* Craddock, Litt. Sel. Cas. 252.

² People *v.* Boring, 8 Cal. 406; Anthony *v.* Wessell, 9 Cal. 103.

³ *In re* Smith, 4 Nev. 254.

⁴ McClure *v.* Engelhardt, 17 Ill. 47; *In re* Smith, supra.

⁵ Blount *v.* Davis, 2 Dev. L. 19; Small *v.* Hodgen, 1 Litt. 16; *In re* Smith, 4 Nev. 254; McClure *v.* Engelhardt, 17 Ill. 47; Frizzle *v.* Veach, 1 Dana, 211; Smith *v.* Kelly, 3 Murph. 507.

⁶ Sumner *v.* Palmer, 10 Rich. L. 38; McElmurray *v.* Ardis, 3 Stroh. L. 212.

⁷ Swink *v.* Thompson, 31 Mo. 336.

⁸ Mathews *v.* Clifton, 13 S. & M. 380; Ehleringer *v.* Moriarty, 10 Iowa, 78; Brooks *v.* Ratcliff, 11 Ired. L. 321; Carter *v.* Spencer, 7 Ired. L. 14.

⁹ McClure *v.* Engelhardt, 17 Ill. 47; Sumner *v.* Palmer, 10 Rich. L. 38; Ehleringer *v.* Moriarty, supra; *In re* Smith, 4 Nev. 254.

¹⁰ Stafford *v.* Williams, 12 Barb. 240.

§ 953. And though the transfer or assignment of the sheriff's certificate be so defective that a deed to the assignee could not be coerced from the officer, yet if he execute a deed in pursuance thereof to the assignee, the deed will be good.¹ The assignee of the certificate under the sheriff's sale is, in law, the assignee of the original party defendant to the execution.² It may be enforced in equity.³

§ 954. A sheriff's deed to two persons for land sold to one of them as nominal purchaser, if in all other respects sufficient, will pass the title to both the grantees in common.⁴

III. WHEN TO BE MADE.

§ 955. If by law there is no redemption, then it follows that the deed is due on payment of the purchase money, (and confirmation, if the latter is required.) Payment is to be made at once. The deed is then to be delivered within a reasonable time; that is, so soon as it can conveniently be made.

§ 956. But if there be redemption, then the ordinary and most general practice is to give the buyer a certificate of sale, showing his right to a deed at the end of the redemption term, if the land be not redeemed.⁵ Where the law calls for such practice, a deed made before the term of redemption expires is void.⁶

§ 957. In Tennessee, however, it is held that the sheriff may make the deed at once, although there be redemption, and that the purchaser is in the meantime entitled to possession, but must account for rents and profits if the premises are redeemed.⁷

§ 958. But if confirmation is by law required, as is the case in some of the States, then the deed can not be made under any circumstances until the sale is confirmed, nor can the certificate.⁸ In such cases the sale is a *quasi* judicial one.

¹ *McClure v. Engelhardt*, 17 Ill. 47; *U. S. Bank v. Voorhees*, 1 McLean, 221; *In re Smith*, 4 Nev. 254.

² *Brisbane v. McCrady*, 1 Nott & McC. 104; *Brooks v. Ratcliff*, 11 Ired. L. 321; *In re Smith*, supra.

³ *Whipple v. Farrar*, 3 Mich. 436.

⁴ *Frizzle v. Veach*, 1 Dana, 211.

⁵ 4 Kent Com. 431.

⁶ *Gorham v. Wing*, 10 Mich. 486; *Gross v. Fowler*, 21 Cal. 892; *Bernal v. Gleim*, 33 Cal. 668; *Moore v. Martin*, 38 Cal. 428.

⁷ *Burk v. Bank of Tennessee*, 3 Head, 696.

⁸ *McBain v. McBain*, 15 Ohio St. 337.

§ 959. If the plaintiff be the purchaser, he need only pay the costs and fees which are going to others than himself, and may discharge the purchase money by receipting the same on the execution. He is not bound to pay it to the officer unless there be other liens or conflicting claims as to priority.¹

§ 960. Though the deed be dated anterior to the time at which the right of redemption expires, yet if not delivered until that time it will be valid. The delivery is the true date, and if the contrary be not shown, it is presumed to have been delivered at the proper time.²

§ 961. The officer can not pass the title without actual receipt of the purchase money, as by charging himself with the amount bid.³

IV. WHAT PASSES BY IT.

§ 962. The office of the deed is to pass the title, which, under execution sales of real property, passes only by the payment of the purchase money and execution of the deed. Therefore, the deed is not to be made until the money is paid. Neither the deed without payment, nor the payment without a deed, can pass the title in law to the purchaser.⁴

§ 963. And if the deed be incompetent, from any cause, to pass title, equity will not aid it. The remedy, if any, is the obtaining of a new deed under the supervision of the court whence the process issued on which the sale occurred. Equity does not aid the imperfect execution of a statutory power, and such is the power under which execution sales at law are made.⁵

§ 964. But equity will relieve against a mistaken execution sale and purchase, as where an intended levy and sale of an execution debtor's property is made of that to which he has no manner of right, claim or possession, and is believed, both by

¹ Fowler *v.* Pearce, 2 Eng. 28.

² Warfield *v.* Woodward, 4 G. Greene, 386.

³ State *v.* Lawson, 14 Ark. 114.

⁴ Leach *v.* Koenig, 55 Mo. 451; Strain *v.* Murphy, 49 Mo. 337. The title passes only by the deed. Myers *v.* Manny, 63 Ill. 211.

⁵ Ware *v.* Johnson, 55 Mo. 500, 503. But if a purchaser takes the officer's deed, after notice that the judgment was satisfied before sale and after offer of the purchase money back by the officer, he is not a *bona fide* purchaser, and equity will declare the deed void as a cloud on the title. Myers *v.* Cochran, 29 Ind. 256.

the officer and purchaser, to have been made of other property which the debtor really owned. In such case, equity, as in other cases of mistake, will interpose for relief.¹

And when, in such case, the execution plaintiff has bid in the property sold, in satisfaction of his execution, and satisfaction is entered of the judgment before the mistake is discovered, equity will set aside the satisfaction and restore the plaintiff to his rights and judgment liens as against all persons, except *bona fide* purchasers, at sales made on junior judgments on the faith of such satisfaction of the plaintiff's judgment.²

§ 965. The sale is completed by delivery of the deed, and although courts have at common law control of and power over their own process and the officer executing the same, and may set aside, or quash, writs and returns of writs; and also, any time before the deed is made and delivered on execution sales, set aside such sales on proper showing.³

But after delivery of the deed, the law powers of the court, in that respect, ceases, and equity only can set the sale or deed aside, on proper showing and proceedings for that purpose set on foot.

§ 966. A defective sheriff's deed, made on execution sale, may be amended or defect supplied by a new deed, if consistent with the facts of the case, and such new one will relate back to the date of the old one, and with the same relation, in that respect, as the old one would have borne if not defective.⁴ Such defect may thus be remedied with or without setting aside the old deed.⁵ And a purchaser of the same property at a subsequent execution sale against the same debtor, who buys with knowledge of such previous sale and defect of deed, is not a *bona fide* purchaser, and will not be protected as such, as against the prior purchaser.⁶

§ 967. In the courts of some of the States it is held, that a sheriff, after he is out of office, may amend his deed made while in office for lands sold by him on execution, so as to show more

¹ Lay *v.* Shaubhut, 6 Minn. 273.

² Ibid.

³ State Bank *v.* Noland, 13 Ark. 299.

⁴ Thornton *v.* Miskimmon, 48 Mo. 219; Alexander *v.* Merry, 9 Mo. 510; Crowley *v.* Wallace, 12 Mo. 143.

⁵ Thornton *v.* Miskimmon, *supra*.

⁶ Ibid.

perfect evidence of right under the deed, such, for instance, as the annexation of a scroll thereto for a seal, where scrolls are used for seals.¹

But we consider this an exception to the general rule and an unsafe practice. The party desiring an amendment should apply to the court for allowance thereof, or quiet the title in equity. For though equity may not cure substantial defects in a sale, it will relieve against accidents and oversights in executing the deed.

§ 968. It is a well established principle in law that the sheriff's deed, on an execution sale, carries to the purchaser only the title which the debtor had in the property at the time of the levy and sale, or judgment lien, if there be a lien in law;² and that, in accordance with this principle, a sale on execution against a husband of lands in which the inheritable estate and fee is in the wife, only carries the right which the husband then had, and that on the death of the wife thereafter, the title of the purchaser under the execution terminated; and although the husband survives her, the execution purchaser is not entitled to the share in the land inherited by the husband as his portion, under the law of descents.³

§ 969. But not only the land itself passes by the deed, if valid, but also such covenants of title as run with the land by ordinary conveyance, also pass to the purchaser by the sheriff's deed on execution sale.⁴ He gets the whole interest and estate of the execution debtor in the premises, including covenants of title, if any.⁵ If the land be redeemed by the debtor, he is thereby reinvested with the covenants of title.⁶ It is to the interest of the debtor that the covenants of title should pass. They enhance the value and are presumed to increase the price at the sale. Were they not to pass they would become of no value to the execution debtor, he having no longer any estate in the land.

¹ Flemming *v.* Powell, 2 Tex. 228; Miller *v.* Alexander, 8 Tex. 36.

² Starke *v.* Harrison, 5 Rich. L. 7; Williams *v.* Amory, 16 Mass. 186.

³ Starke *v.* Harrison, *supra*.

⁴ Rawle, Covenants for Title, 344; Leport *v.* Todd, 32 N. J. Law, 124; Whitling *v.* Butler, 29 Mich. 122, 128, 132; Millar *v.* Babcock, 25 Mich. 137; Columbia Bank *v.* Jacobs, 10 Mich. 349.

⁵ Rawle, Covenants for Title, 369, 370; White *v.* Whitney, 3 Met. 81; Leport *v.* Todd, 32 N. J. Law, 124.

⁶ Rawle, Covenants for Title, 370, 371, n.; White *v.* Whitney, *supra*.

§ 970. There is some diversity of opinion as to whether growing crops will pass to the purchaser at execution sale. Where lands are sold subject to redemption the question can not well arise, for the title remaining, as also the possession, in the defendant during the time allowed to redeem, usually affords to the execution debtor the opportunity of securing his growing crop, if any there be.

§ 971. In Indiana, where lands are to be appraised and must bring a certain proportionate part of their appraised value, when sold on execution, and there being no redemption from such sales, the question necessarily arises as to growing crops, and the ruling is that they pass with the land to the execution purchaser.¹ But, in Ohio, under statutory regulations nearly similar to those of Indiana in that respect, it is held that growing crops, inasmuch as they are not appraised with the land, do not pass with the land by the execution sale.²

§ 972. In Massachusetts, it is held that the execution purchaser, if he makes peaceable entry into possession, becomes entitled to growing crops.³

§ 973. The sheriff's deed on execution sale made to satisfy one or more installments of a judgment debt, discharges the lien of the subsequent installments, and invests the purchaser with the whole estate. He is presumed to have paid, as the highest bidder, the full value of the land, and is entitled to hold it clear of the judgment.⁴

§ 974. It was formerly held in Pennsylvania that the sheriff's deed, if there were no express understanding to the contrary, cut off all liens;⁵ and though in the case cited this is alleged to be a rule of all courts, yet we deem it to have been so only in Pennsylvania, and there by statute.⁶

To remedy this judicial anomaly, after the case of *Willard v. Norris*, the Pennsylvania act of April, 1830, relative to execution sales, was passed, and the rule in that State now is, that

¹ *Jones v. Thomas*, 8 Blackf. 428.

² *Cassilly v. Rhodes*, 12 Ohio, 88; *Houts v. Showalter*, 10 Ohio St. 126.

³ *Nichols v. Dewey*, 4 Allen, 386.

⁴ *Hewson v. Deygert*, 8 Johns. 333.

⁵ *Willard v. Norris*, 2 Rawle, 56; *Zeigler's Appeal*, 35 Penn. St. 173.

⁶ *Johnston v. Crawley*, 25 Geo. 316; *Hunter v. Watson*, 12 Cal. 303.

such sales are subject to superior liens, except such as the law entitles to participate in the proceeds of sale.¹

These latter, however, are not cut off by the sale, technically speaking, but are to be satisfied in their order of seniority out of the fund arising from the sale.²

§ 975. The deed on execution sale of mortgaged premises, on a judgment at law and execution sale, for the mortgage debt, carries only the mortgageor's equity of redemption, and is subject to the mortgage for the rest of the mortgage debt, if sold only for a part.³

§ 976. Where judgments are liens, the deed of the sheriff relates back to the date of the judgment, and carries title from that date against all claims and liens junior thereto.⁴

§ 977. Mere remarks of persons at the sale, not given as notice, will not charge the purchaser.⁵ The title passes only by the deed.⁶ Until then, and the end of the term of redemption, the right of the purchaser is held in abeyance, and if there be redemption, may be discharged by payment of the redemption money.⁷

§ 978. Though the levy and sale be junior, yet they pass the title if on a senior judgment, as against a senior levy and sale on a junior judgment where judgments are liens.⁸

§ 979. Though the execution sale and deed of the mortgageor's equity of redemption passes the remaining right of the mortgageor,⁹ yet if the judgment be not a lien, and before execution the mortgageor convey away his remaining right, or equity of redemption, to a *bona fide* purchaser, then by execution sale thereof against the mortgageor nothing passes, for there was no longer anything to sell.¹⁰

So if the sale purport to be of merely the equity of redemption from a mortgage, and the mortgage is already redeemed,

¹ Helfrich *v.* Weaver, 61 Penn. St. 385.

² Ibid.

³ Jackson *v.* Hull, 10 Johns. 481.

⁴ McCormick *v.* McMurtrie, 4 Watts, 192; Martin *v.* Martin, 7 Md. 368.

⁵ Fickes *v.* Ersick, 2 Rawle, 166.

⁶ Catlin *v.* Jackson, 8 Johns. 520; Anthony *v.* Wessel, 9 Cal. 103; Myers *v.* Manny, 63 Ill. 211.

⁷ Vaughn *v.* Ely, 4 Barb. 159; Smith *v.* Colvin, 17 Barb. 157.

⁸ Marshall *v.* McLean, 3 G. Greene, 363; Rankin *v.* Scott, 12 Wheat. 177.

⁹ Dougherty *v.* Linthicum, 8 Dana, 194.

¹⁰ Ibid.

then nothing passes by the sale and sheriff's deed, for nothing remained to sell.¹

§ 980. If the purchaser takes nothing by his deed, owing to the debtor's having no title, he can not recover back his money from the creditor, but may, in equity, recover of the debtor, as the amount went to pay his debt.²

§ 981. If the description of the land is such as does not identify it, then the deed is void, and the purchaser takes nothing.³

§ 982. The sheriff's deed will not pass the right to a house on the land which another person has a right to take away, if the purchaser buy with knowledge of such right; nor will he be entitled to damages for its removal.⁴

§ 983. Where a vendor sells land on a credit, retaining the legal title until payment, then takes judgment against his vendee for the purchase money, and causes the same land to be levied and sold generally on execution under such judgment, the purchaser at sheriff's sale takes the full legal and equitable title to the land, (unless it be subject to right of redemption,) leaving no interest whatever, equitable or legal, in either the original vendor or his vendee.⁵

There is a forcible illustration of this principle in the case of *The Pittsburgh and Steubenville R. R. Co. v. Jones*, above cited, in which the court say: "The vendors, by proceeding to sell the land under execution issued thereon, elected to sell the legal as well as the company's equitable estate, and the sale upon the judgment for the purchase money was a virtual rescission of the contract."⁶ In this case the court add, as a conclusion, that, "the sheriff's vendees, therefore, took the whole estate in the land—the company's equitable interest under the judgment and execution upon which the sale was made, and the vendor's legal title, in virtue of their implied agreement, to sell the whole estate which they had agreed to convey to the company. As the

¹ *Dougherty v. Linthicum*, 8 Dana, 19

² *Dunn v. Frazier*, 8 Blackf. 432.

³ *Mason v. White*, 11 Barb. 173; *Glenn v. Malony*, 4 Iowa, 314; *Bosworth v. Farenholz*, 3 Iowa, 84.

⁴ *Coleman v. Lewis*, 27 Penn. St. 291.

⁵ *Pittsburgh and Steubenville R. R. Co. v. Jones*, 59 Penn. St. 433, 436, 437.

⁶ *Ibid.*; *Love v. Jones*, 4 Watts, 465; *Horbach v. Riley*, 7 Penn. St. 81; *Bradley v. O'Donnell*, 32 Penn. St. 281.

sheriff's sale divested the company's entire equitable estate, it follows that it no longer had any right or interest in the land whatever."¹ And so, if a mortgage creditor take judgment at law for the mortgage debt, or a part thereof, and cause execution to issue thereon, and the mortgaged premises to be levied and sold, generally, and without stating that the sale is subject to the remainder of the debt and mortgage lien, the execution purchaser takes the whole title, both of the mortgageor and the mortgagee, and acquires the property free of the residue of the mortgage debt and free of the mortgage lien.²

§ 984. A lien creditor, having thus elected to enforce his claim, or a part thereof, at law, by taking judgment and causing the land subject to the lien to be sold generally, and without reservation, or as still subject to the lien, and as the property of the debtor, will be, by the principle of estoppel, prevented thereafter from denying that the complete title was in the execution defendant at the time of the sale, and estopped from again subjecting to sale the property so sold for any unsatisfied portion of his claim.³

§ 985. But if the vendor, who still retains the legal title, take judgment for the unpaid purchase money, and execute and sell the mere equitable right of the vendee in the premises, the sale will not be void, though the more regular way is to sell the land itself.⁴

§ 986. In Iowa, the vendor of real estate, by statute, "when part or all of the purchase money remains unpaid after the day fixed for payment, whether time is or is not of the essence of the contract, may file his petition asking the court to require the purchaser to perform his contract, or to foreclose and sell his interest in the property, and the vendee in such proceeding is to be treated as to foreclosure as a mortgageor."⁵ And the vendor may have a decree for rescission of the contract, or for a sale of

¹ Pittsburgh and Steubenville R. R. Co. *v.* Jones, *supra*; Freeby *v.* Tupper, 15 Ohio, 467.

² Fosdick *v.* Risk, 15 Ohio, 84.

³ Simmond's Estate, 19 Penn St. 439; Magee *v.* Mellon, 23 Miss. 585; Maloney *v.* Horan, 53 Barb. 29; Freeby *v.* Tupper, 15 Ohio, 467; Fosdick *v.* Risk, Id.; Pittsburgh and Steubenville R. R. Co. *v.* Jones, 59 Penn. St. 436; Love *v.* Jones, 4 Watts, 465; Horbach *v.* Riley, 7 Penn. St. 81.

⁴ Gaston *v.* White, 46 Mo, 486.

⁵ Code of Iowa of 1873, p. 532, Secs. 3329 and 3330; Blair *v.* Marsh, 8 Iowa, 144; Pierson *v.* David, 1 Iowa, 31; Page *v.* Cole, 6 Iowa, 154.

the premises, to satisfy the unpaid purchase money and costs of suit. The same right will follow the note given for the purchase money into the hands of an assignee or endorsee, if transferred with the understanding that the assignee should be subrogated to the benefit of the lien.¹

§ 987. Where land is sold on execution, subject to a vendor's lien, the purchaser under the execution sale stands in the shoes of the judgment debtor, except that the judgment debtor has a right to redeem from the execution sale. If he fail to do so within the time allowed for redemption by law, then the purchaser may receive the deed of the sheriff and redeem from the lien of the vendor, and thus obtain complete title to the land, free alike from the claims of the original vendor and of the execution debtor.²

§ 988. The sale of the reversion of leased premises upon an execution against the lessor, carries with it the rent of the premises to the extent secured to the lessor by the lease. The sale operates as an assignment of the lease, and vests in the purchaser, as well the right to the unpaid rent, as the title to the realty. The sheriff's deed conveys the reversion, and the rent follows as an incident thereto.³

§ 989. When husband and wife are seized of lands as tenants of the entirety, a purchaser of the husband's interest therein, under execution at sheriff's sale, can not, in the State of Pennsylvania, maintain ejectment on his purchase for any part of the property. In the language of the court, such purchaser "does not acquire, during the wife's life, any right to the possession, either jointly with her, or to her entire exclusion."⁴ The husband and wife, as tenants of the entirety, are mutually seized of the whole; neither can alienate their interest without the consent of the other.⁵ And though the decision in *McCurdy v Canning* is mainly put upon the Pennsylvania statute of April 11, 1848, yet, to our mind, the same result must follow, if the statute be left out of the question. What one can not himself sell, can not, on execution, be legally sold for his debts. But this case,

¹ *Blair v. Marsh*, 8 Iowa, 144.

² *Bondurant v. Owens*, 4 Bush, 662.

³ *Butt v. Ellett*, 19 Wall. 544.

⁴ *McCurdy v. Canning*, 64 Penn. St. 39; *French v. Mehan*, 56 Penn. St. 286.

⁵ 2 Bl. Com. 182; 4 Kent Com. 362.

which so fully illustrates this interesting subject, is of sufficient importance to warrant the giving of the opinion (which will be found in the note,) of the learned judge at length.¹

The inability of either party to convey without the other joining, has reference to the whole and to each one's moiety of the

¹ Gentry *v.* Wagstaff, 3 Dev. L. 270; French *v.* Mehan, 56 Penn. St. 286. In McCurdy *v.* Canning, 64 Penn. St. 39, the Court, THAYER, Judge, hold the following: "This was an action of ejectment. The defendants, Robert Canning and Eliza, his wife, held under a conveyance in fee made to them during their coverture, and the question is whether the plaintiffs, who were purchasers at sheriff's sale of the husband's interest, can recover possession of any part of the property by this action. If an estate in lands be given to the husband and wife, or a joint purchase be made by them during coverture, they are not properly joint tenants, nor tenants in common, for they are but one person in law, and can not take by moieties, but both are seized of the entirety, *per tout et non per mie*. The consequence of which is, that neither the husband nor wife can dispose of any part without the assent of the other, but the whole must remain to the survivor. 2 Bl. Com. 182. So long ago as Doe *v.* Parratt, 5 T. R. 652, Lord KENYON remarked: 'It has been settled for ages that where a devise is to the husband and wife, they take by entireties, and not by moieties, and the husband alone can not, by his own conveyance, without joining his wife, divest the estate of the wife.' This species of tenancy arises from the unity of husband and wife, and it applies to an estate in fee for life or for years. The same words of conveyance which would make two other persons joint tenants will make the husband and wife tenants of the entirety. Joint tenants are each seized of the whole, and not of undivided moieties. Of such an estate MONTAGUE, C. J., says, in Plowden, 58: 'The husband has the entire use, and the wife has the entire use, for there are no moieties between husband and wife.' The attainer of the husband does not affect the wife's estate. 1 Inst. 187 *a*. Nor can the husband forfeit or alien so as to sever the tenancy, 'because' as CRUISE says, 'the whole of it belongs to his wife as well as to him.' Tit. 18, ch. 1. Nor is such an estate affected by the statutes of partition. 4 Kent's Com. 363; Thornton *v.* Thornton, 3 Rand. 179. The act of 31st March, 1812, which destroyed survivorship between joint tenants in Pennsylvania does not apply to entireties held by husband and wife. Robb *v.* Beaver, 8 W. & S. 111. So that this estate remains as at common law excepting in so far as it may have been affected by the act of 11th April, 1848, commonly called the Married Woman's Act. It would seem to have followed, at common law, from the unity of husband and wife, and the subjection of the latter to the former, that the husband had the control of the estate during his life, and might convey or mortgage it during that period. This is conceded by KENNEDY, J., in Fairchild *v.* Chastelleux, 1 Penn. St. 181, and decided in Barber *v.* Harris, 15 Wend. 615; Jackson *v.* McConnell, 19 Ibid. 175. If the husband might convey or mortgage it for the period of his own life, it would seem to follow, necessarily, that it might be taken in execution and sold by the sheriff for the same period, and that the purchaser of such an interest would be entitled to recover the possession during the life of the husband by an action of ejectment. But just here the act of 11th April, 1848, interposes

whole, for each is seized of the whole, which scizin continues in the survivor on the death of either, leaving such survivor the sole owner of the whole fee. Hence a purchase of the separate interest of either vests no right in the purchaser, enforceable during the joint lives of the husband and wife, and of course not against the survivor of the execution defendant, whose interest may have

an insuperable bar to such a result, declaring that 'every species and description of property, of whatever name or kind, which may accrue to any married woman during coverture, by will, descent, deed of conveyance, or otherwise, shall be owned, used and enjoyed by such married woman as her own separate property, and shall not be subject to levy and execution for the debts or liabilities of her husband; nor shall such property be sold, conveyed, mortgaged, or transferred, or in any manner incumbered by her husband, without her written consent first had and obtained, and duly acknowledged, etc.' The case, therefore, stands thus: Here is a married woman, who is neither a joint tenant or tenant in common with the husband, but who is seized of the whole estate, and with him entitled to possession of the whole. If a purchaser of the husband's interest may be put into possession with her, what follows? This: 1st. You have destroyed her estate and turned her entirety into a joint tenancy, or tenancy in common. 2d. You have deprived her altogether of the possession, because it is not in the nature of things that she can enjoy actual possession with a stranger as she did with her husband. 3d. You have taken away her property without her consent, and destroyed her rights, which were protected by the act of April 11th, 1848. She was entitled to possession of the whole with her husband. You propose to give possession of the whole with a stranger, a possession which she can not, and which he probably would not enjoy. If it should be answered that the property may be rented, and a moiety of the rents and profits may be paid to her, that is only to say that you may deprive her of her estate, and give her another of inferior value, a substitution which you have no right to propose. The words of the act of 1848 are of so comprehensive a character, and its purpose to protect every possible interest of the wife is so plain, that we can not, by any possible construction consistent with the object of the legislature and the language which they have used, except this interest from its protection. These considerations lead us to the conclusion that one who, without the consent of the wife, purchases the husband's interest in real estate in which both husband and wife are seized of the entirety, and to the possession of the whole of which she is entitled equally with him, does not acquire, during the wife's life, any right to the possession, either jointly with her or to her entire exclusion. Practically these two propositions are not alternatives, but the same, for we can as easily marry her to a stranger as marry her possession to his without destroying her estate. The case of *Stoebler v. Knerr*, 5 Watts, (S. C.) 181, is not in conflict with these views. The point to be determined here did not arise in that case, which was decided twelve years before the passage of the Married Woman's Act. In that case the husband and wife did not hold by entireties. There was an absolute conveyance in fee simple to the husband, coupled with a contemporaneous agreement, the intent of which was to control the conveyance and to give the estate jointly to the daughter of the donor and her husband in special tail; but it

been sold on execution, as such interest ceases at his death and becomes sole in the survivor.

§ 990. An easement incident to a mill and to the ground on which the mill is situated, for the supply of water to the mill, is in connection with the mill and premises a subject of judgment lien and of execution sale. The lien of the judgment covers the land or premises, which, being the principal thing, draws to it all its incidents as appurtenant thereto. They, together, constitute one whole. They pass together, and can not be separately sold without destruction, to a great extent, of the lien security of the creditor, and at the same time sacrificing the property of the debtor. They are rightfully sold together, and together will pass to the purchaser, without particular reference to the easement, and under the general description of the premises by metes and bounds.¹

§ 991. In Connecticut the levy of the writ of attachment, whether the levy be on real or on personal property, fixes a lien upon the property, which is to be enforced by execution, after judgment.² But if the execution be not taken out and levied, if on personal property, within sixty days after judgment, and if on real property, within four months after judgment obtained, the lien is lost and the property is no longer bound thereby.³ Provided however, that if the property, in either case, be encumbered by prior attachments, the execution may be had and be levied, and thereby still preserve the lien, within the times limited as aforesaid, after the removal of the other incumbrances by satisfaction or otherwise.⁴ If the property be not proceeded against on execution within the time limited as aforesaid, it is no longer liable thereto. The language of the statute of 1770, which has continued in force to the present day, is, "No estate attached as aforesaid, shall be held to respond to the judgment obtained by the plaintiff at whose suit the same is attached, either against the debtor or any other creditor, unless such

failed for want of apt words to accomplish the result, and it was held that the whole estate was in the husband for life, and that his freehold was a legitimate subject of execution. Judgment for the defendant on the point reserved." *McCurdy v. Canning*, 64 Penn. St. 39.

¹ *Morgan v. Mason*, 20 Ohio, 401.

² *Beers v. Place*, 36 Conn. 578.

³ *Ibid.*; *Preston v. Hicock*, 9 Conn. 522.

⁴ *Beers v. Place*, *supra*.

creditor take out execution on such judgment, and have the same levied on the goods or personal estate within sixty days after final judgment, or on real estate, and have the same appraised and recorded within four months after such judgment is obtained." Then follows the clause as to prior incumbrances. In the language of SHIPMAN, J., "This section has never been repealed or modified, but has remained in force to the present time, (1869.)"¹

§ 992. In Tennessee, the lien of a judgment on real estate is purely a legal one, to be enforced by execution. It continues for a year and a day, and if in that time execution be not sued out and levied, the lien is lost.² But while it continues to exist, such judgment lien takes priority over an unrecorded deed, by force of the statute which renders such deeds void as against judgment creditors,³ although good as between the parties thereto.⁴ When such deed is subsequently recorded, according to the terms of the statute, it does not relate back to its date and cut off the lien of the intervening judgment, but acts *in futuro* as to judgment creditors.⁵

§ 993. But to render a judgment or decree a lien on an equity in lands in Tennessee, the judgment creditor must, within sixty days after the judgment or decree is rendered, cause a memorandum thereof, with date, amount, and parties' names to be registered in the county where the lands lie.⁶

§ 994. In Alabama, the judgment lien is fixed by the issue of execution, and not before; nor is it then continuous in itself. It is only kept alive by keeping up execution, without the lapse of a term in law.⁷ And the ruling there is, that a repeal of the law giving the judgment lien, destroys the lien. In other words, that liens given by statute may be removed by statutory repeal.⁸

§ 995. In North Carolina the judgment is a lien, and this attaches from the docketing of the judgment;⁹ and it is not lost

¹ Beers *v.* Place, 36 Conn. 578. This case was in the U. S. District Court, for the District of Conn., Judge SHIPMAN, presiding.

² Harrison *v.* Wade, 3 Cold. 505.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Branner *v.* Nance, 3 Cold. 299.

⁷ Shaw *v.* Lindsay, 46 Ala. 290, 292; Martin *v.* Hewitt, 44 Ala. 418.

⁸ Ray *v.* Thompson, 43 Ala. 434.

⁹ Dancy *v.* Hubbs, 71 N. C. 424; Murchison *v.* Williams, Id. 135.

by a mere direction to the officer to defer sale of lands after levy, and sale be ordered. It is no injury to plaintiff in a junior writ, for he can levy and sell, and the sale will stand, but the senior liens have priority as to the funds arising from the sale.¹

§ 996. Judgments are liens in Arkansas, on the real estate of the debtor subject to execution for three years, and no longer, unless kept alive by revival under the writ of *scire facias*.²

§ 997. Moneys arising from execution sales of lands, to satisfy judgment liens, are to be distributed between writs emanating from judgments which are liens, when more than one writ is in the officer's hands at the time of sale, according to the priority of the judgment liens of such writs.³ This, too, regardless of still older judgments which are liens, but under which there is no levy; for such unlevied senior liens retain the priority against the land, and the sales on the junior liens are made subject to such priority.⁴

§ 998. When the life of the judgment is fixed by statute, then there is no need of renewal after a year and a day; but only at the end of the statutory life of the judgment;⁵ and when revival is had of the judgment, the lien is thereby re-instated, and the rights of junior lien-holders are as they were before revival became necessary.⁶

§ 999. Judgment liens and contract liens of record, stand in right of distribution in the ordinary order of priority. The oldest takes precedence.⁷

§ 1000. Judgment liens, in Arkansas, attach to after acquired real estate of the judgment debtor, as well as to that held by him at date of judgment.⁸

§ 1001. Judgments in the United States courts, in the district of Arkansas, are liens on lands co-extensive with the territorial jurisdiction of the courts.⁹

¹ *Dancy v. Hubbs*, 71 N. C. 424.

² *Lawson v. Jordan*, 19 Ark. 297; *Trapnall v. Richardson*, 13 Ark. 543.

³ *Trapnall v. Richardson*, *supra*; *Lawson v. Jordan*, *supra*.

⁴ *Lawson v. Jordan*, 19 Ark. 297, 303.

⁵ *Jordan v. Bradshaw*, 17 Ark. 106. This case overrules *Bracken v. Wood*, 7 Eng. 605, which is to the contrary. *Hanly v. Carneal*, 14 Ark. 524.

⁶ *Whiting v. Beebe*, 12 Ark. 421.

⁷ *Doswell v. Adler*, 28 Ark. 82; *Shinn v. Taylor*, *Id.* 523; *Byers v. Engles*, 16 Ark. 543.

⁸ *Trustees of Real Estate Bank v. Watson*, 13 Ark. 74. And so upon a reversionary interest in lands. *Ibid.*

⁹ *Trapnall v. Richardson*, 13 Ark. 543; *Byers v. Fowler*, 12 Ark. 218.

§ 1002. But when the proceeding is *in rem* by attachment, with no personal service, the judgment, either in one court or the other, although personal in form, is a lien only on such lands as are levied on by the writ of attachment.¹

§ 1003. In Mississippi, judgments are liens, and attach also to after acquired lands,² but not to the *equitable assets* of the debtor.³

§ 1004. In California, judgments are liens on the real property of defendants, if docketed, for two years from the date of docketing the same.⁴ But the lien created thereby does not by relation extend back to any earlier period, as for instance to the day of rendering the judgment.⁵

Within this period of two years the plaintiff, unless prevented by a motion for a new trial, or by an appeal, or by a stay-bond, must, to preserve his judgment lien, issue execution, and if he does not his judgment lien is gone.⁶ If there be execution and levy thereof on the realty within the two years or lifetime of the judgment, the levy, in such case, does not create a new lien, nor does it operate to change in any respect the lien of the judgment, but merely attaches itself thereto, and a sale carries such title as the judgment lien affected.⁷

If, on the other hand, a judgment be not docketed, and by reason thereof never becomes a lien on defendant's lands, yet it is valid as a judgment and execution, and sales may be made thereon; but in such case a levy becomes important as fixing the date of the lien, for when a levy is made, it becomes a lien from that date upon the lands levied, and a sale by virtue thereof relates back and carries title from the date of the levy.⁸

If, however, the judgment be for taxes, then the lien bears relation back to the time of the assessment of the tax, as taxes are liens until satisfaction thereof, irrespective of the law of

¹ Parsons *v.* Paine, 26 Ark. 124. The process should be a *venditioni exponas*, or else a special writ of execution, in such cases, directing what is to be sold. Ibid.

² Jenkins *v.* Gowen, 37 Miss. 444.

³ Hogan *v.* Burnett, 37 Miss. 617.

⁴ Bagley *v.* Ward, 37 Cal. 121; Barroilhet *v.* Hathaway, 31 Cal. 397.

⁵ Bagley *v.* Ward, supra; Barroilhet *v.* Hathaway, supra.

⁶ Bagley *v.* Ward, supra; Barroilhet *v.* Hathaway, supra.

⁷ Bagley *v.* Ward, supra; Barroilhet *v.* Hathaway, supra. And this, too, although the judgment lien expires before the sale.

⁸ Hastings *v.* Cunningham, 39 Cal. 137.

ordinary judgment liens.¹ And, therefore, the judgment should find and recite the date of the tax levy.

§ 1005. And where the only estate or interest of a judgment debtor is that of a purchaser of lands, by an executory contract, and the lands are not yet fully paid for, the judgment lien, or execution lien created by levy, and a sale on execution, carries to the purchaser the right only to have the property by completing the payment. He takes the property *cum onere*.²

§ 1006. Judgment liens, in Georgia, attach from the date of judgments, and so of decrees;³ but are divested on sale of the lands in probate, or ordinary, by the administrator.⁴ The judgment creditors are subrogated to the proceeds of such sales and look to those for their priority of payment.⁵ But the lien is not lost by vacating an unproductive execution levy,⁶ nor by death of the judgment debtor.⁷

§ 1007. In Mississippi, execution sale under a junior judgment ordinarily satisfies *pro tanto* the judgment lien of a senior judgment existing against the same property; but the money arising from the sale is to be applied upon the senior judgment, or an amount thereof sufficient to satisfy the same, if the amount realized is more than the amount of such senior judgment.⁸ The practice is for the sheriff to return the money into court, and on application of the senior judgment creditor, the court will apply

¹ Reeve *v.* Kennedy, 43 Cal. 643.

² Logan *v.* Hale, 42 Cal. 645.

³ Kollock *v.* Jackson, 5 Geo. 153, 157. (And so in Florida. Union Bank of Florida *v.* Powell's Heirs, 3 Fla. 176; Clouts *v.* Rich, 12 Fla. 633.) The relation of the lien after sale goes back and carries title from the inception or date of the lien. Kollock *v.* Jackson, *supra*; Roberts *v.* Boylan, 24 Geo. 40, 44.

⁴ Sims *v.* Ferrill, 45 Geo. 585; Stalling *v.* Ivey, 49 Geo. 274.

⁵ Sims *v.* Ferrill, *supra*; Stalling *v.* Ivey, *supra*.

⁶ Rawson *v.* Davis, 36 Geo. 511; Ryan *v.* Lieber, 30 Geo. 433. Nor on personality. Ketchum *v.* Pace, 44 Geo. 654.

⁷ Union Bank of Florida *v.* Powell's Heirs, 3 Fla. 176. And the lien of a subsequent judgment, in Georgia, is held to override the lien of a prior attachment, as the attachment is not an absolute lien until judgment. Kilgo *v.* Castleberry, 38 Geo. 512.

⁸ Mobile & Ohio R. R. Co. *v.* Trotter, 36 Miss. 416; McKee *v.* Gayle, 46 Miss. 676. But the necessity of applying on the older judgment lien or execution, does not apply to payments of money voluntarily made by the debtor, under directions at the time, how to apply the same. In such case the application must be as directed. Miss. Cent. R. R. Co. *v.* Harkness, 32 Miss. 203. The statute does not apply to such cases, but to money raised by sales. *Ibid.*

the money upon his judgment.¹ But if the junior judgment creditor gives to the senior judgment creditor ten days notice of intention to sue out an execution, and within that time the senior judgment creditor does not sue out execution and make levy, then the proceeds of the junior execution sale is applied on the *junior* writ by a provision of the statute.

§ 1008. Though judgment liens were given by law, in Texas,² yet they ceased, or run out, if no execution issued within one year.³ After the expiration of the year it became necessary to revive the judgment, if no execution had issued.⁴ To sustain an execution sale the purchaser relies, in Texas, on the judgment, execution and deed. These constitute the power to sell.⁵ The act of selling by a sheriff, on execution, is merely a ministerial act.⁶

§ 1009. In New Jersey, judgments are liens on lands of the debtor, and the lien attaches from the time of entry of the judgment.⁷ But the lien does not attach to crops growing upon the land.⁸ Yet such crops are liable to levy and sale on execution, and the purchaser at such execution sale has a right to have the crop matured thereon, and may enter on the premises, and care for and tend the same, and gather the produce thereof when matured.⁹ Neither, in New Jersey, are judgments liens upon mere equities, as for instance, *executory* or *incomplete* purchases.¹⁰

§ 1010. State courts have no jurisdiction of maritime liens or contracts. Supplies furnished a vessel in the port where she is registered or enrolled, if so furnished at the instance of the master in charge, and the vessel be engaged in plying between such port and a port of another State, this creates a maritime contract, which can not be enforced by admiralty process in the State courts.¹¹

¹ *Mobile & Ohio R. R. Co. v. Trotter*, 36 Miss. 416.

² *Laws of Texas*, Vol. 4, Sec. 12, p. 95; *Bennett v. Gamble*, 1 Tex. 133.

³ *Ibid.*; *Shapard v. Bailleul*, 3 Tex. 26.

⁴ *Ibid.*

⁵ *Leland v. Wilson*, 34 Tex. 79; *Wofford v. McKinna*, 23 Tex. 43.

⁶ *Leland v. Wilson*, *supra*, 91.

⁷ *Bloom v. Welsh*, 3 Dutch. 177.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Disborough v. Outcalt*, 1 Saxton's Ch. 298; *Vancleve v. Groves*, 3 Green's Ch. 230; *Ketchum v. Johnson's Exrs*, *Id.* 370.

¹¹ *Murphrey v. The Mobile Trade Co.*, 49 Ala. 436; *Steamboat Mist v. Martin*,

V. ITS RECITALS.

§ 1011. The deed of the sheriff need not recite the execution or other proceedings. It is sufficient that they be referred to and identified; and then, if inaccurately, such inaccuracy will not vitiate the deed. The variance is immaterial, so long as the origin of the deed is clearly traceable to a proper source. Such irregularity can work no injury to the parties concerned.¹

§ 1012. The recitals of the deed are ordinarily *prima facie* true, so far as relates to the steps taken by the officer, and as to the authority to levy and sell.²

It has been held that, in their absence, proof of notice of sale must be made to enable the purchaser to enforce the deed.³ But the general rule is to the contrary.⁴

§ 1013. In some States the recitals in the sheriff's deed are evidence by statute.⁵ But if the judgment be not referred to in the recitals; then, to enforce the deed, the existence of the judgment must be made to appear by other evidence.⁶

§ 1014. In California, the recitals in the deed are not evidence of their own truth as against strangers to the proceedings claiming adversely thereto.⁷

¹ 41 Ala. 712; The Gen. Smith, 4 Wheat. 438; The Belfast, 7 Wall. 624; The Eagle, 8 Wall. 15; The Moses Taylor, 4 Wall. 411.

² Humphry *v.* Beeson, 1 G. Greene, 199, 214; Perkins *v.* Dibble, 10 Ohio, 433; Armstrong *v.* McCoy, 8 Ohio, 128; Huggins *v.* Ketchum, 4 Dev. and Batt. L. 414; Cherry *v.* Woolard, 1 Ired. L. 438; Driver *v.* Spence, 1 Ala. 540; Jackson *v.* Jones, 9 Cow. 182; Sneed *v.* Reardon, 1 A. K. Marsh, 217; Jackson *v.* Streeter, 5 Cow. 259; Welsh *v.* Joy, 18 Pick. 477; Craig *v.* Vance, 1 Overt. 209; Jackson *v.* Pratt, 10 Johns. 381; McGuire *v.* Kouns, 7. T. B. Mon. 386; Reid *v.* Heasley, 9 Dana, 324; Wing *v.* Burgis, 13 Maine, 111; Phillips *v.* Coffee, 17 Ill. 154; Jackson *v.* Roberts, 7 Wend. 83; Harrison *v.* Maxwell, 2 Nott & McC. 347; Hinds *v.* Scott, 11 Penn. St. 19; Loomis *v.* Riley, 24 Ill. 307; Buchanan *v.* Tracy, 45 Mo. 437; Acock *v.* Stuart, 57 Mo. 150; Howard *v.* North, 5 Tex. 290; Jones *v.* Taylor, 7 Tex. 240; Frazier *v.* Moore, 11 Tex. 755; Swift *v.* Agnes, 33 Wis. 228, 238.

³ Osborne *v.* Tunis, 1 Dutch. 633, 662; Hardin *v.* Cheek, 3 Jones, L. 135; Kelly *v.* Creen, 53 Penn. St. 302; Samuels *v.* Shelton, 48 Mo. 444; Carpenter *v.* King, 42 Mo. 219; Clark *v.* Sawyer, 48 Cal. 133; Blood *v.* Light, 38 Cal. 649; Jordan *v.* Bradshaw, 17 Ark. 106; Bettison *v.* Budd, Id. 546; Zabriskie *v.* Meade, 2 Nev. 285; Bartlett *v.* Feeney, 11 Kansas, 593.

⁴ Osborne *v.* Tunis, 1 Dutch. 633, 662.

⁵ Perkins *v.* Dibble, 10 Ohio, 433.

⁶ Jordan *v.* Bradshaw, 17 Ark. 106.

⁷ Ibid.; Bettison *v.* Budd, 17 Ark. 546.

⁷ Donahue *v.* McNulty, 24 Cal. 411.

But they are as between the parties to the writ of execution and their privies in interest.¹ The statute of that State requiring certain recitals in the deed, of the particulars of the judgment, execution and parties thereto, with dates, is merely directory, and is designed to render the same evidence between the parties and privies, so as to dispense with the necessity of proving the same in subsequent proceedings; and a want of such recitals, or compliance in that respect, does not void the deed, but the proof may be made, as before the statute, by evidence *aliunde*.² Nor is it required that such recital or reference to the judgment and writ be thereof at large; but merely that reference thereto or statement be made, giving substantial description, and affording an identity thereof, as the source of the officer's authority.³

But if the recital be not made so as to dispense with evidence of the basis of authority to sell, then, by the general rule elsewhere prevailing, it is sufficient on the part of the claimant under the sheriff's deed to show a valid judgment, the writ of execution thereon, and the officer's deed.⁴ No return is necessary to the validity of the proceedings.⁵

§ 1015. In Illinois, a misrecital of the name of the judgment plaintiff, as *John H.* for *Jacob H.*, is fatal to the deed without more; but is held to be open to remedy by other proof, showing the variance to be matter of mistake.⁶ Nor will a mistake in the date of the judgment referred to in the writ by way of recital void the sale.⁷

§ 1016. In Texas, though the ruling is that the officer's deed need not recite the judgment or writ, and that therefore a mistaken recital does not, in said State, vitiate the deed,⁸ Yet the judgment and writ are to be referred to and identified in the deed with reasonable certainty, and should be produced on the trial,

¹ *Clark v. Sawyer*, 48 Cal. 133; *Blood v. Light*, 38 Cal. 649.

² *Clark v. Sawyer*, *supra*; *Blood v. Light*, *supra*. And to the same point see also *Jordan v. Bradshaw*, 17 Ark. 106; *Bettison v. Budd*, *Id.* 546.

³ *Blood v. Light*, 38 Cal. 649. And to the same purport see also *Jackson v. Jones*, 9 Cow. 182; *Perkins v. Dibble*, 10 Ohio, 437.

⁴ *Mayo v. Foley*, 40 Cal. 281; *Blood v. Light*, 38 Cal. 649.

⁵ *Hunt v. Loucks*, 38 Cal. 372.

⁶ *Johnson v. Adleman*, 35 Ill. 265.

⁷ *Swift v. Agnes*, 33 Wis. 228, 238. The discrepancy will be treated as immaterial, or, upon proper application, may be amended, even after the sale. *Ibid.*

⁸ *Howard v. North*, 5 Texas, 290

where recovery is predicated on the deed; but a mere mistake in the reference will not render the deed inoperative.¹

§ 1017. In Massachusetts it is held that an omission to state in the sheriff's deed from what court the execution emanated, will not invalidate the deed nor render it void, if the deficiency in that respect be fully supplied by the writ of execution itself and the return thereon.²

§ 1018. In South Carolina, the recital in a sheriff's execution deed estops the execution debtor from setting up as evidence minutes of contrary purport entered in that officer's books. The recitals in the deed will have control over entries differing therefrom, made in the books of the sheriff.³ But recitals in a sheriff's deed constitute merely matter of inducement, and do not affect strangers or third parties.⁴

§ 1019. Though a statute which is merely directory requires deeds made on execution sales to recite the names of the parties to the execution, and date of the same, and of the judgment on which it issued, yet the omission thereof will not void the same, if it otherwise appear, though not in express terms, that the dates and entries are such as, if expressly stated, would result in an express compliance with the law.⁵

Thus, where the deed refers to a judgment between the same parties, of the same date, and for the same amount as the parties and amount named in the execution, and in the same court from which the execution emanates, the presumption arises that the judgment referred to in the deed and writ, is intended to be so referred to as that on which the writ itself is based; and though the sale be on a *venditioni exponas*, ordered by the court as resting on the original writ of execution, it will be presumed that the execution was regularly followed up by the *vendi*. during the vitality of the former, if it appear from the date of the levy and that of the judgment, that there had not been time for the expiration of the original writ of execution. Thus where, by a com-

¹ Jones *v.* Taylor, 7 Texas, 240; Frazier *v.* Moore, 11 Texas, 755.

² Hayward *v.* Cain, 110 Mass. 273, 276; Welsh *v.* Joy, 13 Pick. 477.

³ Stuckey *v.* Crosswell, 12 Rich L. 273. Such discrepancies are mere irregularities, and are without effect on the validity of the sale and conveyance. *Ibid.*

⁴ Leland *v.* Wilson, 34 Tex. 79; Howard *v.* North, 5 Tex. 290; Jackson *v.* Pratt. 10 Johns. 381.

⁵ Wack *v.* Stevenson, 54 Mo. 481.

bination of all the facts and circumstances of the record, writ and sale, there sufficiently appears that which is necessary to the validity of the sale, the latter will not be treated as void for want of an express statement thereof, where the statute does not declare that invalidity shall be the result of such omission.

VI. ITS RELATION.

§ 1020. Where by law the judgment is a lien on the land, the deed, on execution sale, has relation back to the time of the judgment, so as to avoid, as against the execution purchaser, all intermediate liens and alienations.¹

§ 1021. But although judgments are liens in Iowa, upon equitable interests of the judgment debtor in real estate, yet where such equity does not appear of record, it will not charge a *bona fide* purchaser of the property who buys without notice thereof, and buys from the person in whom the legal title is vested. The purchaser in such case is protected by the recording act.²

§ 1022. Where the judgment is not a lien, and there has been no attachment of the property sold on execution, the deed relates back only to the levy,³ or to the teste;⁴ or, as in some of the States, to the delivery of the execution to the officer,⁵ or to such other act as may be regulated by the legislatures of the several States wherein the judgment does not constitute a lien. The rulings in several of these, as will be seen by the above references, are variant. But if the proceedings were by attachment, then the relation will be to the date of the attachment levy, but, in some cases, from the delivery to the officer.⁶

§ 1023. In Illinois there is a statute, requiring a certificate

¹ Wack *v.* Stevenson, 54 Mo. 481.

² 3 Bac. Abt. Execution, 725; McCormick *v.* McMurtie, 4 Watts, 192; Smith *v.* Allen, 1 Blackf. 22; Riddle *v.* Bryan, 5 Ohio, 48, 55; Kirk *v.* Vonberg, 34 Ill. 440, 448; Miller *v.* Wilson, 32 Md. 297.

³ Hultz *v.* Zollars, 39 Iowa, 589, 593; Bridgman *v.* McKissick, 15 Iowa, 260; Miller *v.* Colville, 21 Iowa, 135, 189; Wallace *v.* Bartle, 21 Iowa, 346, 350; Barker *v.* Pierce, 16 Iowa, 227, 232.

⁴ Reichert *v.* McClure, 23 Ill. 516; McClure *v.* Engelhardt, 17 Ill. 47.

⁵ Winstead *v.* Winstead, 1 Hayw. (N. C.) 243; McLean *v.* Upchurch, 2 Murph. 353; Gilky *v.* Dickerson, 2 Hawks, 341; Lewis *v.* Smith, 2 S. & R. 157.

⁶ Savage's Assignee *v.* Best, 3 How. 111; Bank U.S. *v.* Tyler, 4 Pet. 366, 383; Million *v.* Riley, 1 Dana, 360.

⁷ Shirk *v.* Wilson, 13 Ind. 129; Cockey *v.* Milne, 16 Md. 200; McMillan *v.* Parsons, 7 Jones, L. 163.

of levy to be filed in the recorder's office in the county where the lands levied on lie, whenever levy is made by the sheriff of an execution emanating from a different county, and making such certificate where filed, notice of such levy to all subsequent purchasers, and declaring that before such certificate is so filed, the levy shall be of no effect as to subsequent creditors and *bona fide* purchasers. But if such certificate be filed, then a sheriff's deed on execution sale under such levy, bears relation as to title to the date on which such certificate is filed.¹

§ 1024. If the plaintiff in attachment, does not take a judgment of condemnation against the property attached, but takes a personal judgment, and issues a *fi. fa.* thereon, selling defendant's lands on such writ, instead of obtaining a writ of *venditiori exponas* against the land attached, or a judgment of condemnation and a *venditioni exponas*, then the attachment lien is lost, and the sale will relate back to the lien of the judgment, or of the levy of the execution, as the case may be.²

There ought to be judgment of condemnation against the land, to save the lien of the levy, and the writ, and instead of a *fi. fa.* commanding a levy and sale, of property generally, should be a *venditioni exponas*, commanding the officer to sell the identical property attached.³

§ 1025. In Missouri, such sales and deed thereon, relate back to the day of sale.⁴ That is, if the judgment be not a lien; but if the judgment be a lien on the lands, then the sale and deed relate back to the date of the judgment, and are in law to be regarded as carrying title as from that date.⁵ If the judgment be based upon proceedings by attachment, and there be a valid

¹ McClure *v.* Engelhardt, 17 Ill. 47. See, also, Revised Statutes of Ill. of 1874, p. 154, Sec. 9.

² Amyett's Lessee *v.* Backhouse, 3 Murph. 63.

³ Ibid.

⁴ Winston *v.* Affalter, 49 Mo. 263; Leach *v.* Koenig, 55 Mo. 451. In this latter case, the Supreme Court of Missouri, WAGNER, Justice, say: "The doctrine of relation is a fiction of law adopted by the courts for the purposes of justice, and it has been often held in this court that a sheriff's deed relates back to the sale, as to the defendant in the execution and his privies, and as to strangers purchasing with notice, and vests the title in the execution purchaser from the time." Strain *v.* Murphy, 49 Mo. 337; Groner *v.* Smith, 49 Mo. 318; Shumate *v.* Reavis, 49 Mo. 333; Porter *v.* Mariner, 50 Mo. 364.

⁵ Union Bank of Mo. *v.* Maynard, 51 Mo. 548; Valentine *v.* Havener, 20 Mo. 133; Davis *v.* Ownsby, 14 Mo. 170; Reed *v.* Ownby, 44 Mo. 204.

subsisting levy of the writ of attachment upon the lands subsequently sold, then the *relation* is, back beyond the judgment, to the date of the attachment levy.¹ In New York the deed bears relation to the day of sale;² but doubtless to the date of the judgment also, if the judgment be a lien upon the land.

§ 1026. And so in Delaware, in execution sales of lands, when confirmed, the title of the execution purchaser relates back to the day of sale. Or if there be a lien for satisfaction of which the sale is made, then the relation is to the date of the lien, and in either case, cuts off all intervening transfers, incumbrances, and liens, originating between that time and the confirmation of the sale on the return of the writ.³ And judgments rendered against the execution defendant, at the return term of the writ before confirmation of the sale, are postponed in favor of the execution sale, when the latter is confirmed.⁴

§ 1027. In Oregon, a judgment, execution, and execution sale, predicated upon a note secured by mortgage, but recovered in an ordinary action, without any reference to the mortgage, effectuates a valid execution sale, if there be no other objection thereto;⁵ but the title acquired thereby will relate back only to the lien of the judgment, if there be such a lien, or to the levy of the execution, if there be no judgment lien, for there can be no priority of record, or of relation between the title conferred by the sale, and the lien of the mortgage.

§ 1028. Mechanics' liens operate by relation back to the commencement of the work, for which they are given, or to such other time as is by the record, of decree or judgment, shown that the lien attached.⁶

§ 1029. And so in those States where priority of record gives priority of right, a sheriff's deed made upon execution sale, at a time when there is an outstanding deed for the same lands, but unrecorded, will be postponed to such outstanding deed, if the latter be placed upon record, before filing for record. the deed

¹ Ensworth *v.* King, 50 Mo. 477.

² Potter *v.* Cromwell, 40 N. Y. (1 Hand,) 287, 290.

³ Robinson *v.* Robinson, 3 Harr. (Del.) 391.

⁴ *Ibid.*

⁵ Matthews *v.* Eddy, 4 Oregon, 225.

⁶ Allen *v.* Sales, 56 Mo. 28, 38; Douglass *v.* St. Louis Zinc Co., 56 Mo. 388, 400; Kuhleman *v.* Shule, 35 Mo. 142, 146; Clifton *v.* Foster, 3 N. B. Reg. 656. *In re Coulter*, 3 Chicago Legal News, 377.

made by the sheriff.¹ For the sheriff's deed, in such States, has no relation back of the date of recording, as against prior unrecorded deeds from the debtor, executed by him previous to the execution levy and sale of the land, if such prior deed be first recorded.²

VII. PRIORITY.

§ 1030. In *Rankin v. Scott*, the Supreme Court of the United States, (MARSHALL, Justice,) say: "The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claim."

Therefore it follows from this that a junior sheriff's sale and deed on an execution from a senior judgment, where judgments are liens, gives title to the purchaser against a senior execution sale and deed on a junior judgment.³

The rule is not only "universal," but is as old as the law of liens itself, and is inseparably an essential part of it. Priority is the very essence of the lien, and is its primary object.

§ 1031. It is held by many authorities, that where the plaintiff in execution becomes the purchaser, he will not be protected against an unrecorded deed from the debtor for the same land, older than his lien, as for want of notice of such deed, as he has parted with no money, but merely received the writ. Whereas, as is alleged, to place himself in the position of a *bona fide* purchaser, he must actually have made payment.⁴ But even the ground of this reasoning is untrue in part, for he must, at all events, pay money in discharge of costs and charges of sale.

Under the statute of Iowa, declaring that "no instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration, without notice, unless recorded in the office of the recorder of deeds of the county in

¹ *Leger v. Doyle*, 11 Rich. L. 109.

² *Ibid.*

³ *Rankin v. Scott*, 12 Wheat. 177; *Kirk v. Vonberg*, 34 Ill. 440; *Rogers v. Dickey*, 6 Ill. 636; *Marshall v. McLean*, 3 G. Greene, 303.

⁴ *Williams v. Hollingsworth*, 1 Stroh. Eq. 103; *Freeman v. Hill*, 1 Dev. & Batt. Eq. 389; *Polk v. Gallant*, 2 Ibid. 395; *Rutherford v. Green*, 2 Ired. Eq. 121; *Freeman v. Mebane*, 2 Jones Eq. 44.

which the land lies,"¹ it is held that a *bona fide* purchaser at sheriff's sale of lands takes the property, discharged in law of all equities arising under an unrecorded deed of which he had no notice; and that a judgment creditor who buys in good faith at such a sale is a *bona fide* purchaser in that respect. And so it is held in others of the States.² Not so, however, if the purchase be with notice of the deed.³

Though there is a conflict in the rulings on this subject, more especially in reference to registry acts in some of the States, yet the weight of authority is that third persons, *bona fide* purchasers at sheriff's sale, who have paid the purchase money without notice of an unrecorded deed, or equity, will be protected against the same.⁴ Of late, decisions have gone far toward extending the same rule to purchasers by execution plaintiffs. In *Walker v. Elston*, the Supreme Court of Iowa adjudge the same protection at law to such purchasers as to third persons, and say, "the only question presented by the foregoing facts is, whether a judgment creditor, purchasing at sheriff's sale, takes, as in this case, the lot of ground discharged of all equities arising under an unrecorded deed, of which he had no notice, actual or constructive, at the time of the purchase. We have several times held that he did, and would be protected as an ordinary *bona fide* purchaser under Sec. 2220 of the revision."⁵

§ 1032. But a mere *lien*⁶ of a judgment will not in itself,

¹ Code of Iowa of 1873, p. 358, Sec. 1941.

² *Walker v. Elston*, 21 Iowa, 529; *Butterfield v. Walsh*, 21 Iowa, 97; *Vannice v. Bergen*, 16 Iowa, 555; *Evans v. McGlasson*, 18 Iowa, 150; *Boynton v. Winslow*, 37 Penn. St. 315; *Wood v. Young*, 38 Iowa, 102.

³ *Hoy v. Allen*, 27 Iowa, 208.

⁴ Leading Cas. in Eq. Pt. 1, 75; *Jackson v. Chamberlain*, 8 Wend. 620; *Parker v. Pierce*, 16 Iowa, 227, 243; *Waldo v. Russell*, 5 Mo. 387; *Den v. Richman*, 1 Green, 43; *Scribner v. Lockwood*, 9 Ohio, 184; *Ohio Life Ins. Co. v. Ledyard*, 8 Ala. 866; *Orth v. Jennings*, 8 Blackf. 420; *Mann's Appeal*, 1 Penn. St. 24; *Heister v. Fortner*, 2 Binn. 40; *Woods v. Chapin*, 13 N. Y. 509; *Kellam v. Janson*, 17 Penn. St. 467; *Walker v. Elston*, 21 Iowa, 529; *Butterfield v. Walsh* 21 Iowa, 97; *Vannice v. Bergen*, 16 Iowa, 555; *Evans v. McGlasson*, 18 Iowa, 150; *Norton v. Williams*, 9 Iowa, 529; *Massey v. Westcott*, 40 Ill. 160; *Fosdick v. Barr*, 3 Ohio St. 471; *Stewart v. Freeman*, 22 Penn. St. 120; *Gocpp v. Gartiser*, 35 Penn. St. 130; *McFadden v. Worthington*, 43 Ill. 362.

⁵ *Walker v. Elston*, 21 Iowa, 531; *Massey v. Westcott*, 40 Ill. 160; *Evans v. McGlasson*, 18 Iowa, 150.

⁶ For a *lien* is not an *interest* in the property. It is merely a right to make the money out of it; until enforced by sale and deed, no control exists over

before sale, override a prior unrecorded deed of conveyance or mortgage, so as to confer title on an execution purchaser, who afterwards buys under it with notice thereof, actual or constructive.¹ If the deed or mortgage be recorded before sale, the purchaser will be legally affected with notice.²

§ 1033. Where a judgment is rendered against a mortgage debtor, subsequent to the date of the mortgage deed, and such mortgage deed is regularly executed and recorded prior to execution sale upon the judgment, a purchaser at the execution sale takes nothing but the debtor's mere right of redemption from the mortgage; and such, too, is the general rule, though the mortgage deed be not recorded: *Provided*, the purchaser at the execution sale *has notice* of the mortgage;³ and so the unrecorded deed will be good against a conveyance made in consideration of a precedent debt.⁴

But if there be nothing of record to show a prior mortgage or other conveyance by the judgment debtor, older than the judgment at the time of execution sale and payment of the purchase money, and the purchaser is without notice of such prior mort-

the property in the owner of the judgment lien. *Conrad v. Atlantic Ins. Co.*, 1 Pet. 386, 448; *Miller v. Sherry* 2 Wall. 244.

¹ As is said by THOMPSON, Justice, in *Grevemeyer v. Southern Mutual Ins. Co.*, 62 Penn. St. 342. "A judgment is not a general and not a specific lien. If there be personal property of the debtor, it is to be satisfied out of that. If there be not, then it is a lien on all his real estate, without discrimination, and hence the plaintiff is not interested in the property as property, but only in his *lien*. The judgment creditor has neither *jus in re* nor *ad rem*, as regards the defendant's property. He has a *lien*, and the law gives a right to satisfaction out of the property, and that is all." See also *Conrad v. Atlantic Ins. Co.*, 1 Pet. 384; *Kemper v. Adams*, 5 McLean, 507; *Schaffer v. Cadwallader*, 36 Penn. St. 126; *Thelusson v. Smith*, 2 Wheat. 396; *First National Bank of Tama v. Hayzlett*, 40 Iowa, 659.

² *Chapman v. Coats*, 26 Iowa, 288; *Valentine v. Havener*, 20 Mo. 133; *Norton v. Williams*, 9 Iowa, 529; *Parker v. Pierce*, 16 Iowa, 227; *Bell v. Evans*, 10 Iowa, 353; *Welton v. Tizzard*, 15 Iowa, 495; *Evans v. McGlasson*, 18 Iowa, 151; *Hoy v. Allen*, 27 Iowa, 208; *Potter v. McDowell*, 43 Mo. 93; *Thomas v. Kennedy*, 24 Iowa, 397; *First National Bank of Tama v. Hayzlett*, 40 Iowa, 659. In the case last cited the Supreme Court of Iowa, DAY, J., reiterate this principle, and say: "It is now the settled law of this State that an attachment or judgment lien does not take precedence over a prior unrecorded deed or mortgage of which the creditor had no notice."

³ *Hubble v. Vaughn*, 42 Mo. 138.

⁴ *Pancoast v. Duval*, 26 N. J. Eq. 445.

gage or deed, then the purchase under sheriff sale prevails against such prior conveyance.¹

§ 1034. In Ohio, however, under the statute of Feb. 22, 1831, which gives force, as between the mortgagee and third persons, to mortgages only from the time they are recorded, it is held that a purchaser under execution sales, though buying with knowledge of an older unrecorded mortgage, and though he be the plaintiff in execution, takes a title to the land that overrides the lien of an unrecorded mortgage or assignment to secure a *bona fide* debt; and this, too, where the judgment was junior in date to the assignment or mortgage deed.

The Ohio courts hold "that such unrecorded instruments are good and effectual between the parties, but entirely nugatory as to third parties, both at law and in equity, until they are recorded." The same ruling exists in Ohio as between two mortgages, where one is recorded and the other not. The first of record has priority.²

§ 1035. The purchaser at sheriff's sale on execution in an attachment proceeding and sale of real estate in Ohio, takes subject to all claims, whether legal or equitable, of which he has notice, or is, in law, chargeable with notice of. Thus, where title to lands is in the name of a debtor, and the lands are attached as his property in a suit by the creditor, but the same lands in reality are merely held by him in trust for another person, notice of such trust to the purchaser at execution sale, be-

¹ *Massey v. Westcott*, 40 Ill. 160, 163. In this case, involving a purchase by a judgment creditor, the Supreme Court of Illinois say: "Under our statutes, a purchaser and a judgment creditor having a lien, stand upon the same equity, and this has been so held ever since the act of 1833, and the case of *Martin v. Dryden*, 1 Gilm. 216. The same remark applies to another point made by appellant's counsel, to-wit: That the lien of a judgment attaches only to whatever interest in the land the judgment debtor may, in fact have, and does not take precedence of a prior purchaser claiming under an unrecorded deed. This has been so held in some of the States, but under our act of 1833 it is the settled law of this State that a judgment lien attaches to whatever interest in real estate the records disclose in the judgment debtor, in the absence of actual notice from other sources."

² *Fosdick v. Barr*, 3 Ohio St. 471, 475; *Holliday v. Franklin Bank*, of Columbus, 16 Ohio, 533; *White v. Denman*, 16 Ohio, 59; *Jackson v. Luce*, 14 Ohio, 514; *Mayham v. Coombs*, 14 Ohio, 428; *Stansell v. Roberts*, 13 Ohio, 148. Before the recording act of 1831, the recording of mortgages was placed on the same footing as absolute deeds; hence the rulings were different. *Fosdick v. Barr*, above cited; *White v. Denman*, supra; *Stansell v. Roberts*, supra.

fore he buys, will postpone the title thereby acquired to that of the owner of the trust estate; and a conveyance by the execution debtor made to such equitable owner, and duly recorded before the sale, will charge the purchaser at sheriff's sale with notice of the trust, and all equities thereof.¹

§ 1036. In Ohio, the rights of an execution purchaser at sheriff's sale bear relation by statute as against a dormant or unrecorded equity to the date of the sheriff's sale, and the deed, when executed, confers title as against all such equities from the date of the sale, and not from its own date; therefore, where such equity is unknown to the purchaser at the time of the execution sale, his deed from the sheriff, though of subsequent date, will override such equity, although notice thereof be imparted to the purchaser after the day of sale and before the delivery of the deed to him by the sheriff. The court say: "The deed executed at a subsequent date has relation back to that date, and is as effectual as if then made."²

§ 1037. An execution purchaser who has not paid the purchase money is not a *bona fide* purchaser.³

§ 1038. But when the purchase money is paid, the sale will confer a prior equity over an assignment of the land to a creditor to secure a prior debt, though the assignment be anterior in date to the judgment.⁴

§ 1039. As between executions emanating from several lien judgments of even date, the writ first levied is held to obtain priority.⁵ So, as a sequence, if the judgments be not liens.⁶

§ 1040. When an execution purchaser buys land subject to a mortgage debt, and afterward sells and conveys the same to a grantee, who takes with knowledge of the mortgage, and who retains out of the purchase money a sum sufficient to discharge the mortgage, with a view to meet the same and protect himself against it by paying it off, he is thereby estopped to deny that the execution sale was made subject to the mortgage debt.⁷

¹ Byers *v.* Wackman, 16 Ohio St. 441.

² Oviatt *v.* Brown, 14 Ohio, 285.

³ Swayze *v.* Burke, 12 Pet. 11.

⁴ Fosdick *v.* Barr, 3 Ohio St. 471; Stewart *v.* Freeman, 22 Penn. St. 120.

⁵ Rockhill *v.* Hanna, 15 How. 189; Adams *v.* Dyer, 8 Johns. 347, 350; Waterman *v.* Haskin, 11 Johns. 228; Bruce *v.* Vogle, 88 Mo. 100.

⁶ Lathrop *v.* Brown, 23 Iowa, 40.

⁷ Crooks *v.* Douglass, 56 Penn. St. 51.

§ 1041. And in the same State, (Pennsylvania,) a *bona fide* purchaser at sheriff's sale, on a junior judgment, will take priority over the lien of an older judgment marked of record "satisfied," although not satisfied in point of fact. The record, as to the subsequent execution purchaser, being considered verity.¹

§ 1042. If two mortgages be given for the purchase money of lands in one and the same transaction, and of one date, both being recorded on the same day, and within the time required by law, their equities are equal and their liens are coterminous; no priority is gained by either over the other. A sheriff's sale of the whole property on either extinguishes the other.²

But if one of the mortgages, though expressed to be for a part of the purchase money, be in reality the fruits of a different transaction, then it will become secondary to the other in point of priority, and a sheriff's sale in foreclosure of the same will not divest or extinguish the other.

§ 1043. A sheriff's deed for lands on execution sales, in Pennsylvania, comes within the registry acts, and is overreached by a deed for the same lands executed by the debtor in Ohio, according to the laws of Pennsylvania, and recorded in the latter State within the time allowed for recording foreign deeds, although the judgment under which the sale by the sheriff was made was rendered before the recording of the deed made in Ohio, and although the sheriff's deed was recorded within the time allowed by the laws of Pennsylvania for recording domestic deeds. The deed of the debtor, made in Ohio prior to the rendition of the judgment in Pennsylvania, left no interest in the land in the debtor to which the judgment lien could attach.³ The estate

¹ Coyne v. Souther, 61 Penn. St. 455, 458.

² Dungan v. American Life Ins. Co., 52 Penn. St. 253, 256. In this case the court use this language: "And the doctrine is unquestionably true that if purchase money be secured by two mortgages, and both are recorded on the same day, and within sixty days of their date, their liens are coterminous, and no priority of one over the other can be predicated; and, of course, a sheriff's sale on either divests the other."

³ Hultz v. Ackley, 63 Penn. St. 142, 144. The court in this case say: "As it (the deed made in Ohio) was made and delivered before the recovery of the plaintiff's judgment, it vested in the grantee a valid and absolute title to the lot, which was not affected by the judgment, for, at the time of its recovery, the grantor had no interest in the premises to which its lien could attach, and consequently no title passed to the plaintiff under the sheriff's sale."

had passed out of the judgment debtor to his grantee by deed, and this deed being recorded in due time was not fraudulent as to the execution purchaser.

§ 1044. In Pennsylvania, the statute confers upon courts of law, in issuing executions upon judgments for the levy and sale of real estate, the power to order and designate therein the order or priority of sales of lands of the judgment debtor, so as to subserve the equities of other creditors or persons interested therein, when the same is capable of being done, and such equities are apparent to the court. This statutory power not only extends to cases of subrogation previously exercised by the courts as *equity* power, but also to cases where the estates of several persons are subject to a judgment lien; to the discharge of which they should, by law or equity, contribute. The court may in such cases order the property which is liable to the incumbrance or lien to be sold, in the proportion and order of succession in which the several owners of the property are liable in law or equity to the discharge of the debt.¹

§ 1045. The rule of priority in writs of attachments, in Virginia, is, that the writ first served has priority, but only to the extent of the service.²

§ 1046. In Colorado, the rule is, that all attaching creditors suing the same debtor, in the same term, come in, if successful in recovering, for a *pro rata* distribution of the proceeds of sales that may be realized;³ but if one unsatisfied judgment It still remains in the grantee, unless he has lost it, as contended, by his laches in not recording his deed within the time allowed by law, in order to render it valid and operative against the plaintiff. As a sheriff's vendee is a purchaser for a valuable consideration within the meaning of the recording acts, he is protected by them. If, therefore, the defendant failed to record his deed in proper time, it must be adjudged fraudulent and void against the subsequent deed of the sheriff under which the plaintiff claims, and which was registered in the prothonotary's office before the defendant's deed was recorded. If the defendant's deed had been executed and acknowledged within the State, then, under the provisions of the first section of the recording act of 18th March, 1775, it would have been his duty to record it within six months after its execution, and the omission would have rendered it fraudulent and void as against the plaintiff. But, as we have seen, his deed was executed and acknowledged in Ohio, and if it is governed by the second section of the act, he had twelve months within which to record it before incurring the penalty of having it adjudged fraudulent and void against a subsequent purchaser, whose deed might be first recorded."

¹ Roddy's Appeal, 72 Penn. St. 98, 99, 100.

² Farmers' Bank v. Day, 6 Gratt. 360.

³ Maloney v. Grimes, 1 Col. 112.

creditor redeems from execution sale, and then levies and sells under his judgment and execution, he is then entitled to the whole proceeds of such last sale, to the extent of his own judgment, redemption money and costs..

§ 1047. In Georgia, the State has priority in the distribution as between creditors, except as against lien creditors. The latter are preferred alike as to the State and to others.²

§ 1048. In sales involving questions of priority in the distribution of the proceeds, the equities or legal rights of priority ought to be settled by the court previous to the sale. By this course the rights of all are known, and competition in bidding is encouraged, as those bidding are free from doubt.³

§ 1049. In Texas, under the act of February, 1860, the junior judgment, if the first recorded, is entitled to preference in the distribution of the proceeds of sale of real estate over a senior one, although the execution on the senior judgment be the first issued and levied.⁴ For, although prior to the act of 14th February, 1860, judgments were liens on real estate, yet by that act judgments in the future were only liens from the time of record thereof in the county court. Thus the law stood until the act of November, 1866, by which the old law was substantially re-enacted, and judgments again became liens by their own mere force, without such recording.⁵ But it is held in the same case that railroads are not real estate, and, therefore, that the proceeds of sale, in such a case, inured to satisfy the writ first levied, that being the rule as to personality.⁶

§ 1050. As between execution sales emanating from proceedings by attachments of equal regularity and validity, the sale under the oldest attachment proceedings, or attachment first levied, has priority and carries the title.⁷

And it matters not to the contrary that the sale being of real property, the action is commenced in a different county than

¹ *Maloney v. Grimes*, 1 Col. 112.

² *Robinson v. The Bank of Darien*, 18 Geo. 65.

³ *Hall v. English*, 47 Geo. 511. If the officer, without proper cause, refuses the highest bid and strikes off the property to a lower one, equity will rescind the sale and enforce a resale, commencing with the bid so by him disregarded, first giving proper notice of the resale. *Duffey v. Rutherford*, 21 Geo. 363.

⁴ *Scoggin v. Perry & S. Pacific R. R. Co.*, 32 Tex. 21.

⁵ *Ibid.*

⁶ *Ibid.; McMahan v. Hall*, 36 Tex. 59.

⁷ *Laird v. Dickerson*, 40 Iowa, 665.

that wherein the land is situated, if the writ of attachment be regularly levied thereon and returned into the court from whence it issued, and the cause be then transferred, or venue thereof be changed for trial on application of the defendant, into the court of the county wherein the land levied upon is situated; for, although it were *error* to commence the suit or proceedings *in rem* in a different county than the one in which the property sought to be seized is situated, yet by removal of the cause, under the statue, to the right county, on motion of the defendant, the error is obviated and the attachment levy takes precedence over a similar levy subsequently made on attachment proceedings instituted in the county where the land is situated. In such case the execution purchaser under the prior attachment takes the title.¹

§ 1051. In South Carolina, the rule is not only that a *bona fide* purchaser, at execution sale, holds over an unrecorded mortgage, or sales thereon,² but also, if the debt for which the execution sale is made was contracted with a subsequent creditor, who at the time had no notice of such unrecorded mortgage. That, in the latter case, although the execution purchaser buys with notice of the mortgage, yet if the sale at which he buys is for a debt contracted subsequent to the making of the mortgage, and the debtor had no notice of the mortgage at the time of giving the credit, then he would be entitled as for such debt to priority over the mortgage, and, therefore, so would a person purchasing under an execution to enforce payment of such debt.³ And such seems to be a reasonable and just view of the case.

§ 1052. In execution sales of real property, in Missouri, after satisfying the writ on which the property is sold, if the senior lien, the subsequent or junior liens are to be paid in the order of their priority.⁴

VIII. REGISTRATION.

§ 1053. Sheriffs' deeds, on execution sales, are within the provisions of recording acts.⁵ The purchaser is bound by and

¹ *Laird v. Dickerson*, 40 Iowa, 665.

² *McKnight v. Gordon*, 13 Rich. Eq. 222.

³ *Ibid.*

⁴ *Strawbridge v. Clark*, 52 Mo. 21; *Reid v. Mullins*, 43 Mo. 306; *Foster v. Potter*, 37 Mo. 525, 534; *Helweg v. Heitcamp*, 20 Mo. 569.

⁵ *Hosier v. Hall*, 2 Ind. 556; 3 *Bouvier*, 58, n.; *Massey v. Thompson*, 2 Nott

entitled to claim all the provisions thereof.¹ Therefore, in those States where priority in recording gives priority of title, an execution purchaser who first records his deed, within the law, gains thereby the same preference as if the deed was from the debtor himself.²

Such purchaser is no more chargeable by a deed imperfectly recorded, than he would be if the deed were not recorded at all.³

§ 1054. By the laws of Iowa, Sec. 3355 of the Revision of 1860, a purchaser at execution sale was required to record his deed, within twenty days after the expiration of the time allowed for redemption. The failure to do so, however, did not postpone the deed to the benefit of a junior purchaser who buys with notice of the deed. In *Harrison v. Kramer*,⁴ the Supreme Court, WRIGHT, Justice, say: "However much this section might operate to protect a *bona fide* purchaser without notice, who might take title after the twenty days therein named, it certainly can not protect one who purchased with actual notice of the rights of the purchaser under the execution, or one who purchases with a fraudulent intention to defeat the execution purchaser's title." This statute was not designed to protect fraud, nor as a penalty against a failure to record, but to protect the innocent. A purchaser with notice of prior right in another is not innocent in that respect.

§ 1055. But the irregular recording of a deed, does not operate as constructive notice to subsequent *bona fide* purchasers; as where lands in one State are attempted to be conveyed by a deed executed in a different State, and the evidences of execution and acknowledgment of the deed are not such as are required by the law of the State where the lands are situated, a record of so ill an executed and evidenced conveyance, is not evidence in an action involving title to the lands described therein, nor is it evidence to show constructive notice of the

& McC. 105; *Jackson v. Terry*, 13 Johns. 471; *Wallace's Lessee v. Lawrence*, 1 Wash. C. C. 503; *Walker v. Green*, 21 Iowa, 529; *Hultz v. Ackley*, 63 Penn. St. 142, 144; *Jackson v. Post*, 15 Wend. 588.

¹ *Hosier v. Hall*, 2 Ind. 556; *Potter v. McDowell*, 43 Mo. 93; *Massey v. Wetcott*, 40 Ill. 160; *Goepp v. Gartiser*, 35 Penn. St. 130.

² *Ellis v. Smith*, 10 Geo. 253; *Jackson v. Post*, 15 Wend. 588; *Jackson v. Chamberlain*, 8 Wend. 620; *Jackson v. Terry*, 13 Johns. 471.

³ *Goepp v. Gartiser*, 35 Penn. St. 130.

⁴ 8 Iowa, 548.

original; and the original itself is void as against a subsequent purchaser at execution sale whose deed is of record.¹

§ 1056. A conveyance duly made by the debtor and properly recorded, to a *bona fide* purchaser, will take priority over a sheriff's deed made for the same property on execution sale, on a prior attachment sale and deed thereon, where the last named deed is not recorded until after the private purchase, conveyance, and record of deed are completed, under the statute of Michigan, which provides that no conveyance shall be valid against any other person than the grantor, and his heirs and devisees, *and persons having actual notice* thereof, unless it is made by deed, recorded as provided by law.²

§ 1057. But as against a *bona fide* sale by the judgment debtor, made after the execution sale, but before the recording of the sheriff's deed to the purchaser at execution sale, there being no transcript of the judgment filed in the county where the land lies, the execution sale and deed will be invalid.³ In such cases of sales of lands in one county, on executions emanating from judgments obtained in another county, the writ of execution should issue from the county where the original judgment is obtained, and if it does not, but emanates from the place in which the record is filed and docketed, a sale thereon will be void. The object of filing the transcript in the county where the land lies, is to create a judgment lien on the lands, and also to give notice to the purchasers buying after judgment and before execution sale.⁴

§ 1058. It is well settled in Missouri, that an unrecorded deed, or mortgage, takes priority over a judgment, or an attachment levy, if the deed or mortgage be recorded before an execution sale is made under the judgment. This law has been well

¹ *Morton v. Smith*, 2 Dillon, 316. And this too, although the plaintiff in the writ be the purchaser, where the statute declares unrecorded deeds void, as against subsequent purchasers without notice, whose deeds shall be first recorded. *Ibid.*

² *Millar v. Babcock*, 25 Mich. 137.

³ *McGinnis v. Edgell*, 39 Iowa, 419. To make the execution sale take priority, over the subsequent purchase from the sheriff, the judgment creditor should have filed and docketed, in the county where the land lies, a transcript of the judgment, as the statute provides, before suing out, and selling on execution, and thus have made the judgment a lien upon the land, and the record or docket thereof notice to subsequent purchasers. *Ibid.*

⁴ *Furman v. Dewell*, 35 Iowa, 170; *Seaton v. Hamilton*, 10 Iowa, 394.

settled in that State, and it has thus become a rule of property, which is respected by and governs the courts;¹ upon the same principle, that the recording of the deed or mortgage before execution sale, gives priority thereto if older than the judgment, or attachment levy, as constructive notice to purchasers at the execution sale, so actual notice of the mortgage or deed, though still unrecorded, should give the latter priority, wherever there is no statutory impediment in the way.

IX. COLLATERAL IMPEACHMENT.

§ 1059. A sheriff's deed on execution sale, to a *bona fide* purchaser, if regular in itself, can not be impeached in a collateral proceeding, for mere error or irregularity in the proceedings, judgment, execution, or return, or for want of a return, if there be a valid judgment and execution.² Nor for the reason that the appraisers, where the sale is under the appraisement law, acted without seeing the land.³ Nor by parol evidence, that the execution on which the sale was made was withdrawn, or that the levy had been abandoned before the sale.⁴ Nor because the

¹ Reed *v.* Ownby, 44 Mo. 204; Davis *v.* Ownsby, 14 Mo. 170; Valentine *v.* Havener, 20 Mo. 133.

² Landes *v.* Brant, 10 How. 371; Landes *v.* Perkins, 12 Mo. 254; Jackson *v.* Bartlett, 8 Johns. 362; Jackson *v.* Roosevelt, 13 Johns. 97; Ware *v.* Bradford, 2 Ala. 676; Love *v.* Powell, 5 Ala. 58; Hubbert *v.* McCollum, 6 Ala. 221; Cockerel *v.* Wynn, 12 S. & M. 117; Daviess *v.* Womack, 8 B. Mon. 383; Humphry *v.* Beeson, 1 G. Greene, 199; Draper *v.* Bryson, 17 Mo. 71; Thompson *v.* Phillips, 1 Bald. C. C. 248; Thomas *v.* Jeter, 1 Hill, L. (S. C.) 380; Den *v.* Wright, 1 Pet. C. C. 64; Wood *v.* Colvin, 5 Hill, 231; Hinds *v.* Scott, 11 Penn. St. 19; Maurier *v.* Coon, 16 Wis. 465; Bowen *v.* Bell, 20 Johns. 338; Lessee of Wilson *v.* McVeagh, 2 Yeates, 86; Wilson *v.* Conine, 2 Johns. 280; Vance *v.* Reardon, 2 Nott & McC. 299; Morrison *v.* Dent, 1 Mo. 246; Den *v.* Despreaux, 7 Halst. 182; Den *v.* Farlee, Id. 326; Den *v.* Morse, Id. 331; Weyand *v.* Tipton, 5 Sergt. & R. 332; Clark *v.* Lockwood, 21 Cal. 220; Hendrickson *v.* St. Louis & Iron Mount. R. R. Co., 34 Mo. 188; Cox *v.* Joiner, 4 Bibb, 94; Ferguson *v.* Miles, 8 Ill. 358; Sexton *v.* Wheaton, 4 Wheat. 503; Durham *v.* Heaton, 28 Ill. 264; Stow *v.* Steel, 45 Ill. 328; Kinney *v.* Knoebel, 47 Ill. 417; Armstrong *v.* Jackson, 1 Blackf. 210; Anderson *v.* Clark's Heirs, 2 Swa. 156; Dunn *v.* Meriwether, 1 A. K. Marsh. 158; Martin *v.* McCargo, 5 Litt. 293; Smith *v.* Moreman, 1 T. B. Mon. 154; Riggs *v.* Dooley, 7 B. Mon. 239; Wilson *v.* McGee, 2 A. K. Marsh. 602; Childs *v.* McChesney, 20 Iowa, 431; Willard *v.* Whipple, 40 Vt. 219; Phillips *v.* Coffee, 17 Ill. 154; Burton *v.* Emerson, 4 G. Greene, 397.

³ Jackson *v.* Vanderheyden, 17 Johns. 167.

⁴ Ibid.

execution issued out of season, or for any fault of the sheriff in not following the statute, if the court has jurisdiction of the case from which the execution emanated.¹ Nor by failure of the sheriff to advertise, if the purchaser be a *bona fide* one.²

§ 1060. In *Hubbard v. Barnes*, 29th Iowa, p. 239, the court held, that a sale of lands situated in one county, on an execution issued on a judgment in a different county, was valid as between the execution plaintiff and debtor, as also against a subsequent purchaser under the execution debtor with notice thereof, although a transcript of the judgment had not been filed as is by the statute provided, in the county where the lands were situated, previous to the levy and sale. The court held, that though the judgment could not become a lien on such lands, without the filing of the transcript, and though the judgment and sale together would not be notice without such transcript, which would be implied in law; that nevertheless actual notice of such judgment, execution and sale, to a subsequent purchaser under the execution debtor, serves in that respect instead of such filing of a transcript, and renders the execution sale valid.³ Of said Sec. 3249, (this section corresponds to Sec. 3031 of the later Code of 1873,) the court say: BECK, Justice, its provisions "are directory only, and compliance therewith is not necessary to authorize the service of an execution in a county other than the one where the judgment was rendered." That if there be not such compliance, then there will be "no record notice of the levy and sale," and "neither will a judgment be a lien upon lands" situate in such other county; that although "in such case the law will raise no presumption of notice of sale," yet "actual notice" "will supply the want of record notice, or, rather, the existence of actual notice, the very end aimed at by the statutory provisions above quoted, will supersede the necessity of the record;" and that the deed on the sheriff's sale "will be held valid as to all having actual notice thereof."⁴

§ 1061. In New Jersey it is held that collateral evidence may not be received, to invalidate an execution sale by showing satis-

Armstrong *v.* Jackson, 1 Blackf. 210; Thompson *v.* Tolmie, 2 Pet. 157; Henry *v.* Ferguson, 1 Bailey, 512; Barkley *v.* Screeven, 1 Nott & McC. 408; Hubbard *v.* Barnes, 29 Iowa, 239.

¹ Lawrence *v.* Speed, 2 Bibb, 401.

² Hubbard *v.* Barnes, 29 Iowa, 239, 242.

⁴ Ibid.

faction of the judgment.¹ Nor will omission to endorse the writ repleviable, nor omission of the notice of sale to defendant required by the statute, render the sale invalid.²

§ 1062. In Mississippi, the ruling is that issuing execution and selling after the death of defendant, is merely an irregularity and does not affect the sale when brought up collaterally.³

§ 1063. Though the deed may be made to a person other than the purchaser, at the purchaser's request, and will in that respect be valid;⁴ yet, if so made without authority to one not entitled to have it, such fact may be shown according to the ruling in South Carolina, and will avoid the deed.⁵

§ 1064. But the evidence of the officer who made it, is not allowable to alter, vary, or contradict the deed itself, or the legal effect thereof.⁶

§ 1065. And though not impeachable collaterally, for mere error or irregularity in the proceedings and judgment, if there be a valid judgment and execution, yet where a seal is required to deeds, and the instrument or deed is not sealed it will be void.⁷

§ 1066. Although a court of equity will not aid the defective execution of a deed made on judicial or execution sale, yet in a trial involving the validity of such a deed mere irregularities, ambiguities, or contradictory statements therein, as *clerical defects*, may be aided or explained by the record and files of the court in the proceedings in which the sale is had.⁸

And though certain things required by the statute are not expressly shown to have existed in the proceedings for the sale, as the swearing of the appraisers and the like, yet after report and confirmation, or approval of the sale by the court, it will be intended that the existence of these was shown.⁹

§ 1067. But if in fact no report or confirmation of the sale ever be made at all, or the order of confirmation, if there be one,

¹ Nichols *v.* Disner, 5 Dutch. 293.

² Ehleringer *v.* Moriarty, 10 Iowa, 78.

³ Harper *v.* Hill, 35 Miss. 63; but see to the contrary, Erwin *v.* Dundas, 4 How. 58.

⁴ Landrum *v.* Hatcher, 11 Rich. L. 54.

⁵ Ibid.

⁶ Donahue *v.* McNulty, 24 Cal. 411.

⁷ Moreau *v.* Detchemendy, 11 Mo. 431; Moreau *v.* Branham, 27 Mo. 351.

⁸ Moore *v.* Wingate, 53 Mo. 398; Stewart *v.* Severance, 43 Mo. 322; Glover's Lessee *v.* Ruffin, 6 Ohio, 255.

⁹ Cases cited above.

be from any cause void, as for want of authority to make the same when made, then no such presumption of regularity will arise; and if it appears affirmatively that in truth no appraisement was ever made, and none be stated in the deed to have been made, then the deed, for such defect, will be void.¹

§ 1068. And a sheriff's deed made in one State and purporting to have been made on an execution sale of lands, is not evidence in itself in an action or suit in another State, wherein the existence of it or of such sale is brought in question. To render it admissible, however relevant otherwise, a full record of the judicial proceedings, in the case from which it purports to originate, is necessary.² Even in the State where the sale is made and the land sold is situate, in a direct action involving possession of the land, there must be evidence of the judgment and writ of execution.³

§ 1069. No less evidence should be required in a different State. But while in the State where the judgment is rendered the mere production of the latter and the writ prove themselves, yet in a different State a full record, or exemplification thereof, is essential to show the existence of the judgment and writ, and must be certified or authenticated, as required by act of Congress in reference to authentication of the records of one State to be used in another State.

§ 1070. A judgment confessed by a regular attorney of the court, upon warrant of attorney so to do, can not be questioned in a collateral proceeding, nor can the validity of an execution and sale of lands made thereon.⁴

The party aggrieved by such judgment, if wrongfully suffered to be entered, should take steps to have it set aside, and not submit to a sale thereon.⁵ The injured party has his remedy also against the attorney by proceedings in the same court.⁶

¹ *Moore v. Wingate*, 53 Mo. 398; *Strouse v. Drennan*, 41 Mo. 289.

² *Porter v. Wells*, 6 Kan. 448.

³ *Ibid.*; *Ante, Execution Sales of Real Prop. Chap. XVI, Div. III.*

⁴ *Hageman v. Salisbury*, 74 Penn. St. 280.

⁵ *Ibid.*; *Cyphert v. McClune*, 22 Penn. St. 194; *Evans v. Meylert*, 19 Penn. St. 403.

⁶ *Hageman v. Salisbury*, *supra*.

X. ESTOPPEL.

§ 1071. The defendant in execution is estopped by the sheriff's deed, to deny title in himself at date of sale to the lands sold. So from date of levy, if the judgment be not a lien; and from the date of the judgment where judgments are liens; and he can not set up an outstanding title to avoid the sheriff's sale.¹

§ 1072. This disability can not be evaded by going out of possession after the sale, and re-entering under color of an alleged better title, any more than if the deed be made by himself.²

In the case cited from 3 Washington, C. C., the court, WASHINGTON, Justice, state the rule in terms as follows: "The cases cited by the plaintiff's counsel are full to the point, that the purchaser under an execution, in an ejectment against the defendant in the execution, or one claiming under him, need not show any other title than a judgment, execution and sheriff's deed; and that the defendant will not be permitted to controvert such title by showing it to be defective, or by setting up a better outstanding in a third person."³

§ 1073. But this rule will not apply in a case of a bare claim to sell without foundation, where the execution debtor has neither title nor possession, and does not direct the levy and sale of it as his property.⁴

§ 1074. Nor is the execution debtor estopped to deny title in himself in lands sold under a *void* execution, although he directs the sale; for such execution and sale being both void, there is no authority for the sale to impart validity to the estoppel.⁵

§ 1075. As against a purchaser at execution sale, the debtor is estopped to deny his ownership of that which he directs the officer to levy and sell. So also as to those claiming under such purchaser.⁶ This doctrine is asserted in *Major v. Deer*,⁷ by the Supreme Court of Kentucky in the following terms: "When the land is sold at the instance or with the assent, express or presumed, of the defendant, as he is benefited by it, he should be

¹ *Cooper v. Galbraith*, 3 Wash. C. C. 550; *O'Neal v. Duncan*, 4 McCord, 246; *Matney v. Graham*, 59 Mo. 190.

² *Cooper v. Galbraith*, supra; *Jackson v. Bush*, 10 Johns. 223.

³ *Cooper v. Galbraith*, supra.

⁴ *Jackson v. Hagaman*, 1 Wend. 502; *Matney v. Graham*, 59 Mo. 190.

⁵ *Geoghegan v. Ditto*, 2 Met. (Ky.) 433.

⁶ *Reid v. Heasley*, 2 B. Mon. 254.

⁷ 4 J. J. Marsh. 586; *Reid v. Heasley*, supra.

bound by it, as his own voluntary act; and, therefore, should not be permitted to deny that the purchaser acquired any title," for though ordinarily the statute of frauds will cut off a parol authority to sell real estate, yet when there is legal power to sell and convey without it, then such parol expression of a preference as to the property to be sold will be valid.

XI. MAKING TITLE UNDER EXECUTION DEED.

§ 1076. Plaintiff making title under an execution sale is, as a general principle, as against the debtor, only bound to show a valid judgment, execution, and sheriff's deed.¹

§ 1077. And when the deed is made to an assignee of the sheriff's certificate, no other evidence of the assignment is required than recitals to that effect in the deed itself.² Such deed to an assignee is legal and valid in that respect. It is simply a matter between the original purchaser and the assignee, and the informality of the assignment is equally immaterial as regards the judgment debtor.³

§ 1078. Thus, in Florida, the execution purchaser relies on the general rule in making title under his purchase.⁴ But if the proceeding is between such purchaser and a person other than the execution debtor, then title must be shown in the debtor at time of sale, or at such time prior, if a lien is invalid, as will give title under the sale.⁵ If the judgment under which the sale is made is against the representative, then his character must be shown in making title.⁶ The purchaser must resort to

¹ *Splahn v. Gillespie*, 48 Ind. 397, 401; *Carpenter v. Doe*, 2 Ind. 465; *White v. Cronkhite*, 35 Ind. 483; *Mercer v. Doe*, 6 Ind. 80; *Lewis v. Phillips*, 17 Ind. 108; *Evans v. Ashby*, 22 Ind. 15; *Compart v. Hanna*, 34 Ind. 74; *Armstrong v. Jackson*, 1 Blackf. 210; *Frakes v. Brown*, 2 Blackf. 295; *Burke v. Tregre*, 22 La. Ann. 629; *Davis v. Wilcoxen*, 5 La. Ann. 583. When these are shown then the presumption of regularity arises. *Mithoff v. Dewees*, 9 La. Ann. 550, and *Miller v. Wilson*, 32 Md. 297; *In re Smith*, 4 Nev. 254; *Lenox v. Clark*, 52 Mo. 115; *Hughes v. Watt*, 26 Ark. 228; *Fischer v. Eslaman*, 68 Ill. 78.

² *Splahn v. Gillespie*, 48 Ind. 397, 403; *In re Smith*, 4 Nev. 254.

³ *Splahn v. Gillespie*, *supra*; *In re Smith*, *supra*.

⁴ *Hartley v. Ferrell*, 9 Fla. 374. So in Georgia. *Whatley v. Doe*, 10 Geo. 74. If the judgment and execution can not be found, the recitals thereof in the deed are *prima facie* evidence of their existence. *Boatright v. Porter's Heirs*, 32 Geo. 130.

⁵ *Hartley v. Ferrell*, *supra*.

⁶ *Davis v. Shuler*, 14 Fla. 438. And the same is the rule in Georgia. See *Watson v. Tindal*, 24 Geo. 494.

his action to get possession on execution sale. The sheriff can not put him in possession.¹

§ 1079. So, in Arkansas, to make title under execution sale, the party must show a judgment, execution, levy and deed.²

When these are shown, the recitals in the deed are *prima facie* true under the statute, but may be contradicted by evidence, and if proven untrue, will invalidate the deed in that respect.³ And if the sale be under a *venditioni exponas*, and be of other lands than those levied on by the *f. fa.*, no title will pass thereby.

A levy without sale is not in itself a satisfaction of the judgment, and, therefore, if excessive, plaintiff may release part of the lands levied without prejudice.⁴ The title of the execution purchaser is not affected by omission of the officer to set forth the manner of giving notice, for the law raises a presumption thereof, and if omitted by the officer, it does not invalidate the sale, but the remedy is by action of the execution debtor against the officer, if injury ensues.⁵

The purchase of lands at execution sale, by a third person, for the debtor's benefit, is fraudulent as against other unsatisfied judgments, if the debtor is insolvent, and will be set aside and the lands subjected in equity to sale for such other debts.⁶ So also as against subsequent purchasers with notice of the facts.⁷

XII. IN LAW, THE OFFICER IS REGARDED AS AGENT OF THE DEBTOR.

§ 1080. The rule obtains that, in law, the officer in making an execution deed is regarded as the agent of the execution debtor, so constituted by the law for that particular purpose, where the proceeding on which it is based is such as to justify the making of the deed.⁸

¹ Seymour *v.* Morgan, 45 Geo. 201.

² Hughes *v.* Watt, 26 Ark. 228.

³ Ibid.; Bettison *v.* Budd, 17 Ark. 546.

⁴ Black *v.* Nettles, 25 Ark. 606; Green *v.* Burke, 23 Wend. 490; Ostrander *v.* Walter, 2 Hill, 329; The People *v.* Hopson, 1 Denio, 574.

⁵ Stewart *v.* Houston, 25 Ark. 311.

⁶ Miller *v.* Fraley, 21 Ark. 22.

⁷ Manhattan Co. *v.* Evertson, 6 Paige, 457; Gallatian *v.* Cunningham, 8 Cow. 361.

⁸ Den *v.* Winans, 2 Green, 1; Montgomery *v.* Bruere, 1 South. 260; Hyatt *v.* Ackerson, 2 Green, 564, 567; Den *v.* Camp, 2 Penn. (N. J.) 365.

CHAPTER XVII.

SETTING ASIDE EXECUTION SALES.

- I. POWER OF THE COURT TO SET SALE ASIDE.
- II. FOR INADEQUACY OF PRICE.
- III. FOR MISCONDUCT IN SELLING.
- IV. FOR MISTAKE, IRREGULARITY, AND FRAUD.
- V. FOR REVERSAL OF THE JUDGMENT.
- VI. RETURN OF THE PURCHASE MONEY.

I. POWER OF THE COURT TO SET SALE ASIDE.

§ 1081. The court upon whose judgment the execution issues has full power to set aside an execution sale whenever the ends of justice and fair dealing require it, and to order a resale, or award execution anew, at discretion.¹

This principle is aptly illustrated, in a few words, in *McLean County Bank v. Flagg*,² by the Supreme Court of Illinois: "The power over its own process is possessed by all courts. Such power is a species of equitable jurisdiction that is inherent in courts of law as well as those of equity. This court has repeatedly held, as between the purchaser and the original parties to the suit, that a court of law will not hesitate to exercise the power of setting a sale aside on account of fraud or irregularity."

§ 1082. The application to set a sale aside should ordinarily be made first by motion to the same court from whence the process of execution issued;³ and must be made within a reasonable time, unless there be circumstances to excuse delay.⁴

It has been held that (if made by motion) it should be made within the time allowed by law for redemption;⁵ but, at all

¹ *Draine v. Smelser*, 15 Ala. 423; *Reed v. Diven*, 7 Ind. 189; *Nelson v. Brown*, 23 Mo. 13; *Cummings' Appeal*, 23 Penn. St. 509; *Jones v. Portsmouth & Concord R. R. Co.*, 32 N. H. 544; *Davis v. Campbell*, 12 Ind. 192; *Hayden v. Dunlap*, 8 Bibb, 216.

² 31 Ill. 290, 295.

³ *Prather v. Hill*, 36 Ill. 402.

⁴ *Ibid.*; *Stewart v. Marshall*, 4 G. Greene, 75.

⁵ *Raymond v. Pauli*, 21 Wis. 531; *Stewart v. Marshall*, 4 G. Greene, 75.

events, it should be before the intervention of intermediate rights of third persons,¹ and, we may add, before barred by lapse of time.

§ 1083. And when the ground relied on for setting aside the sale is for not selling in parcels, the application must be made in seasonable time. A delay of eleven years is so unreasonable as to cause the application to be overruled at once, if unexplained.² It might be otherwise, however, if for newly discovered fraud, and there be no shorter limit fixed by statute.

§ 1084. Proceedings to set an execution sale aside must be at the suit of one interested at the time of sale. They will not be entertained when prosecuted by a claimant under subsequent conveyance from the execution debtor. It is only those to whom the sale is injurious at the time it occurs who can move or petition to set it aside. He who buys subsequently buys subject to, but does not buy the injury or right to vindicate the proceeding.³

§ 1085. But judgment and execution creditors, and other junior incumbrancers of an insolvent debtor, have such interests, and may be heard to set aside execution sale of the debtor's property, as being against their interest; if there be cause it will be set aside.⁴

And so the court has power, in the interest and right of justice, to set an execution sale aside of its own mere motion for fraud, mistake, or other proper cause.⁵

II. FOR INADEQUACY OF PRICE.

§ 1086. Ordinarily, inadequacy of price is not alone sufficient cause for setting aside an execution sale which is in other respects unexceptionable, and when the sale is made to a *bona fide* purchaser.⁶

¹ Prather *v.* Hill, 36 Ill. 402.

² Wood *v.* Young, 38 Iowa, 102.

³ Shaw *v.* Lindsay, 46 Ala. 290; Miller *v.* Carnall, 22 Ark. 274.

⁴ Merwin *v.* Smith, 1 Green Ch. 182; Miller *v.* Carnall, *supra*.

⁵ Seaman *v.* Riggins, 1 Green Ch. 214; Howell *v.* Hester, 3 Green Ch. 266; Hamburg Manf. Co. *v.* Edsall, 1 Hals. Ch. 249.

⁶ Duncan *v.* Sanders, 50 Ill. 475; Boyd *v.* Ellis, 11 Iowa, 97; Coleman *v.* Bank of Hamburg, 2 Stroh. Eq. 285; Reed *v.* Brooks, 3 Litt. 127; Wallace *v.* Berger, 25 Iowa, 456; King *v.* Tharp, 26 Iowa, 283; Mixer *v.* Sibley, 53 Ill. 61; Comstock *v.* Purple, 49 Ill. 158; McMullen *v.* Gable, 47 Ill. 67; Am. Ins. Co. *v.* Oakley, 9 Paige, 259; Hannibal & St. Jo. R. R. Co. *v.* Brown, 43 Mo. 294; Craig *v.* Garnett's Admr., 9 Bush, 97; Pattison *v.* Josselyn, 43 Miss. 373.

§ 1087. But when the inadequacy is such as to amount to a badge of fraud, or, together with other circumstances, is such as to shock the moral sense, and particularly when surrounded by indications of hardship and unfairness, the sale will be set aside.¹

§ 1088. And when the price sold for is greatly inadequate, and the notice of sale is indifferently given, or set up at a great distance from the place of sale, or there are other circumstances tending to show that an opportunity was not given for proper competition of bidders, the sale will be set aside.²

§ 1089. The sale on execution of land worth four hundred dollars for sixty dollars, but subject to a prior lien of one hundred dollars, is not such an inadequacy of price as will in itself cause a sale to be set aside;³ especially so, after an interval of eleven years before application to vacate the sale. Nor, after such delay, when coupled with the fact of selling *en masse* lands that ought to have been sold in parcels.⁴

§ 1090. So, when the price for which it is sold is inadequate, and the purchaser concealed knowledge which would tend to influence others to bid a greater sum, the sale will be set aside.⁵

§ 1091. Likewise, if the plaintiff in execution bid in the property by an oversight for less than his debt, and is willing to

¹ Boyd *v.* Ellis, 11 Iowa, 97; Howell *v.* Baker, 4 Johns. Ch. 119, 120; Gist *v.* Frazier, 2 Litt. 121; Blight's Heirs *v.* Tobin, 7 T. B. Mon. 616; King *v.* Tharp, 26 Iowa, 283; Hannibal & St. Jo. R. R. Co. *v.* Brown, 43 Mo. 294; San Francisco *v.* Pixley, 21 Cal. 56; Stump *v.* Martin, 9 Bush, 285; Hart *v.* Bleight, 3 T. B. Mon. 273; Craig *v.* Garnett's Admr., 9 Bush, 97; Gibbons *v.* Bressler, 61 Ill. 110; Outcalt *v.* Disborough, 2 Green's Ch. 214; Mercereau *v.* Prest, 2 Green's Ch. 460.

² Nesbitt *v.* Dallam, 7 G. & J. 494; Swope *v.* Ardery, 5 Ind. 213, 215; Griffith *v.* Hadley, 10 Bosw. 587; Ringold *v.* Patterson, 15 Ark. 209. In Hannibal & St. Jo. R. R. Co. *v.* Brown, 43 Mo. 294, the Supreme Court of Missouri lay down the rule as follows: "It may be stated as a general proposition, that inadequacy of consideration is not of itself a distinct principle of relief in equity. Nevertheless, where the transaction discloses such unconscionableness as shocks the moral sense and outrages the conscience, courts will interfere to promote the ends of justice and defeat the machinations of fraud. The very fact that upward of eleven thousand acres of valuable land, in one of the best counties in the State, was levied on to satisfy an execution of less than one hundred and fifty dollars, is suggestive of the most flagrant abuse of legal process."

³ Wood *v.* Young, 38 Iowa, 102.

⁴ Ibid.

⁵ Hutchinson *v.* Moses, 1 Browne, 187.

bid the full amount thereof, the sale will be set aside, and a resale will be ordered on his application.¹

§ 1092. Where, at an execution sale, there was confusion in bidding, by reason of conflicting writs of execution and liens, and also from conditional and unconditional bids being made by one and the same person, having a tendency to confuse and disconcert the officer, and the property sold for a very inadequate sum, compared to its real value, the court held that the sale should be set aside.² The officer "can receive only an unconditional cash bid." Those accompanied with a condition should not be heeded.³

§ 1093. If a purchaser at sheriff's sale succeed, by false statements or suggestions, in deterring others from bidding, and thereby obtain the property for an inadequate price, the sale will be set aside⁴ and a resale ordered.

§ 1094. But one claiming an interest in lands under an executory contract of sale, which is fraudulent as against the creditors of the party thus undertaking to sell, can not complain that the lands were sold on execution against his intended grantor for an inadequate price, as a reason for setting aside the execution sale; nor can the fraudulent claimant of such spurious incipient right set it up against the prior legal title of the execution purchaser, procured by means untainted with fraud. Such fraudulent claim is invalid as against the rights of a *bona fide* purchaser under the execution.⁵ For the pretended owner of it the law affords no remedy or day in court. Were it untainted with actual fraud, it would still be invalid for want of consideration as against the *bona fide* creditors of the maker of it.

§ 1095. But although inadequacy of price will not alone be cause to set a sale aside, unless so gross as to raise a presumption of other cause, yet when inadequacy is combined with accident or appearances of fraud or unfairness, the sale will be set aside.⁶ The case here cited in the note was one in which a subsequent incumbrancer was prevented, by accident or

¹ Ontario Bank *v.* Lansing, 2 Wend. 260.

² Swope *v.* Ardery, 5 Ind. 213.

³ Ibid.

⁴ Vantrees *v.* Hyatt, 5 Ind. 487; Bunts *v.* Cole, 7 Blackf. 265; Bethel *v.* Sharp, 25 Ill. 173.

⁵ Daniel *v.* Henry, 4 Bush, 277.

⁶ Howell *v.* Hester, 3 Green's Ch. 266.

mistake, from bidding, and the price obtained was inadequate; the court set the sale aside.

§ 1096. Where an execution sale is made out of the ordinary time, although upon the day advertised for the sale, and after a supposed or mistaken supposition of an indefinite adjournment thereof, and the property is purchased at a price so inadequate as to amount to a mere pittance of its real value, the sale will be set aside.¹

And so, if notice be not given, as required by law, the sale, on proper application, will be set aside.²

§ 1097. And so, the sale on execution of bank stocks, worth in the market eighty cents on the dollar, at twelve cents, where the return of the officer does not show any compliance with the law, by advertisement or public sale, and there are other circumstances tending to show an effort to get the stock at less than its value, will be set aside.³

So an execution sale will be set aside for surprise, but not for surprise alone, when such surprise is the result of the applicant's own negligence;⁴ likewise, as has been stated, for inadequacy of price, connected with collusion between the purchaser and the execution debtor.⁵

§ 1098. But a mere difference of opinion between appraisers selected to appraise real estate about to be sold on execution and witnesses examined in regard to the value of the property is no evidence of fraud in the appraisement, nor is it ground for setting aside the sale.

If there be no evidence of fraud or mistake of the appraisers, in the discharge of their functions, the result of their finding is final. A mistake merely in judgment on the part of the appraisers is not sufficient, nor is there any means of testing it. Their *judgment*, if they are properly chosen, is the real test of value, and from which there is no appeal.⁶ But we may add here, that if so grossly out of the way as to naturally raise the inference in all honest minds of intended unfairness, that in itself will amount to evidence of fraud.

¹ Parker *v.* Hannibal & St. Jo. R. R. Co., 44 Mo. 414.

² Whitaker *v.* Beach, 12 Kansas, 492.

³ Mechanic's Bank *v.* Pitt, 44 Mo. 364.

⁴ Bullard *v.* Green, 10 Mich. 268.

⁵ Pattison *v.* Josselyn, 43 Miss. 373.

⁶ Lawrence *v.* Edelen, 6 Bush, 55.

III. FOR MISCONDUCT OF THE OFFICER SELLING.

§ 1099. A court has full power over its officers and their acts in making execution sales, so far as to correct all wrongs and abuses, errors and irregularities, mistakes, omissions and frauds; and whenever it is satisfied that a sale made under its process is affected with fraud, irregularity, or error, to the injury of either party in interest, or that the officer selling is guilty of any wrong, irregularity, or breach of duty, to the injury of the parties in interest, or of either, or of any one of them, the court, on proper application, will set the sale aside and order a resale.¹

§ 1100. Though it is the duty of the officer to sell in parcels, or a less parcel than the whole tract, where a less quantity will subserve the purpose of satisfying the execution, yet the subdivision must be discreetly made, with a view to the interests of all concerned. Therefore, for an officer to sell a central portion of a tract of land to his own son-in-law, and so taken out of the tract as to greatly impair the value of the residue, and so as to cut off all direct communication between the remaining parcels, is an abuse of the process of the court; such an abuse is the more aggravated if the land be sold for a sum greatly below its true value, and the court will set aside such a sale, both for the improper conduct of the officer and for inadequacy of price.²

IV. FOR MISTAKE, IRREGULARITY AND FRAUD.

§ 1101. A sheriff's sale of land on execution will be set aside for irregularity, fraud, or mistake, or a willful disregard of the law as to the manner of selling, whereby an injury results to either party in interest, or to third persons interested *bona fide* in the subject matter of the sale. Such is the general tenor of the authorities on the subject.³

¹ Hamilton *v.* Burch, 28 Ind. 233; Lashley *v.* Cassell, 23 Ind. 600; Draine *v.* Smelser, 15 Ala. 423; White Crow *v.* White Wing, 3 Kan. 276; Benz *v.* Hines, Id. 390. In Hamilton *v.* Burch, the court say: "Where there is any departure from duty on the part of the sheriff, which may prove injurious to the rights of the execution defendant, in the sale of the property, and the consideration paid is greatly inadequate, the sale will be set aside."

² Hamilton *v.* Burch, 28 Ind. 233; Lashley *v.* Cassell, 23 Ind. 600.

³ Catlett *v.* Gilbert, 23 Ind. 614; Vantrees *v.* Hyatt, 5 Ind. 487; Mobile Cotton Press Co. *v.* Moore, 9 Port. (Ala.) 679; Myers *v.* Sanders, 7 Dana, 507; Dougherty *v.* Linthicum, 8 Dana, 194; Rector *v.* Hartt, 8 Mo. 448; Bay *v.* Gililand, 1 Cow. 220; Hayden *v.* Dunlap, 3 Bibb, 216; Hutchinson *v.* Moses, 1

Thus the sale on execution of "specific farms and lots of land together," (says SPENCER, Justice,) or "sales in mass of real estate held in parcels, are not to be countenanced or tolerated." They are oppressive and unnecessary, even if there be no actual frauds, and will, on motion, be set aside.¹

§ 1102. So, likewise, if by law the execution plaintiff has the right of election as to what property shall be levied, or the order in which it shall be taken, and is not allowed to exercise that right, the levy in such cases will be set aside,² and so would the sale, if made.

1103. And so if the sheriff raise, by execution sale, a greater amount of money than by the writ he is commanded to make, with costs, and the land sold was susceptible of subdivision, so as to sell a less quantity, and raise the amount only of money required, the sale will be set aside, unless the separation and sale of a smaller quantity would have tended to impair the value of the different parts when so separated.³

§ 1104. The sheriff's deed will not be set aside for being executed by the sheriff's deputy. In *Carr v. Hunt*, the Iowa Supreme Court hold on this subject the following language: "That the sheriff's deed was executed by the deputy of the sheriff is no cause for setting it aside at the instance of the defendant in execution. And then, if the deed was set aside, the judgment or decree and sale would remain. If the sale was valid, to set aside the deed would accomplish no practical good."

§ 1105. The principal, or high sheriff, may execute the deed by his deputy; that is, the deputy may perform the manual act of making it; but it must purport to be the act and deed of the principal by his deputy, and not the act of the deputy. It must be done in the name of the principal officer.⁴

Browne, 187; Wiggins *v.* Chance, 54 Ill. 175; Stewart *v.* Nelson, 25 Mo. 309; *Abbey v. Dewey*, 25 Penn. St. 416; Neal *v.* Stone, 20 Mo. 296; Wooten *v.* Hinckel, 20 Mo. 290; Stewart *v.* Severance, 43 Mo. 322; Reed *v.* Carter, 3 Blackf. 376; Bethel *v.* Sharp, 25 Ill. 173; Howell *v.* Hester, 3 Green's Ch. 266; Fleming's Heirs *v.* Hutchinson, 36 Iowa, 519.

¹ Jackson *v.* Newton, 18 Johns. 355; Boyd *v.* Ellis, 11 Iowa, 97; Bradford *v.* Limpus, 13 Iowa, 424; Patton *v.* Stewart, 19 Ind. 233; San Francisco *v.* Pixley, 21 Cal. 56; Griffith *v.* Hadley, 10 Bosw. 587.

² Evans *v.* Landon, 6 Ill. 307; Wiggins *v.* Chance, 54 Ill. 175; Stevenson *v.* Marony, 29 Ill. 584.

³ Carlile *v.* Carlile, 7 J. J. Marsh, 625; Williams *v.* Allison, 33 Iowa, 278.

⁴ Carr *v.* Hunt, 14 Iowa, 206.

§ 1106. If lands consisting of several parcels be levied and sold in the aggregate, the sale will be set aside.¹ This, too, notwithstanding they bring an adequate price, for such manner of selling puts impediments in the way of redemption, as the judgment debtor will be compelled to redeem the whole or none. Moreover, although the price sold for may appear adequate, yet the debtor is entitled to have the property bring all it will command, and *non constat*, but that if offered in parcels the aggregate amount of the sale would have been greater than when sold as a whole.

§ 1107. And the court will interfere, if necessary, by injunction, to prevent the delivery of the deed by the sheriff, where different parcels of land are so sold in the aggregate.²

§ 1108. If the plaintiff in execution be the purchaser, and it turns out that defendant had no interest in the land, so that by the sale plaintiff took nothing, the sale will be set aside and satisfaction of the judgment will be cancelled.³

§ 1109. The execution sale of lands at a greatly inadequate price, and in mass, by description of the original tract, which had been subdivided into city lots, and platted as such on the official map, was set aside as irregular for not having been sold or offered in parcels, as also for inadequacy of price.⁴

§ 1110. But in some of the States it is held that, to justify the setting aside a sale for being sold in mass instead of in parcels, it should be made apparent, to the satisfaction of the court, that a materially larger sum would have resulted from the sale if sold in parcels, or else that the sale of less than the whole tract would have brought enough to satisfy the writ.⁵

§ 1111. If one, by means of promise of favor, prevents others from bidding for lands at an execution sale, and thereby obtain them himself at an under-value, he will not be permitted thus to enrich himself at the expense of others, against all the principles of equity and moral propriety. Such a sale will be set aside if a proper application, in proper time, be made.⁶

¹ Jackson *v.* Newton, 18 Johns. 355; Piel *v.* Brayer, 30 Ind. 332; Winters *v.* Burford, 6 Cold. 328; Catlett *v.* Gilbert, 23 Ind. 614.

² Ballance *v.* Loomiss, 22 Ill. 82.

³ Ritter *v.* Henshaw, 7 Iowa, 97; Watson *v.* Reissig, 24 Ill. 281.

⁴ San Francisco *v.* Pixley, 21 Cal. 56.

⁵ Wallace *v.* Berger, 25 Iowa, 456; Cunningham *v.* Felker, 26 Iowa, 117.

⁶ Mills *v.* Rogers, 2 Litt. 217.

§ 1112. And so, where property was bid in at execution sale, at a price greatly above its true value, under the impression and belief of the purchaser, and of the officer selling, induced by the defendant in execution, that the land covered a factory of considerable value, when, in fact, the premises sold consisted of merely a garden spot of trivial value, the sale was set aside.¹

§ 1113. A charge on land by will for the payment of a decedent's debts, is in effect a devise of the land for the payments of the debts, and is a trust which chancery will take hold of and see that it is equitably applied. The land being thus a subject of trust, which is cognizable in equity only, is not liable to levy and sale on execution under a common law judgment, and, therefore, one creditor of the decedent can not take advantage of other creditors, and absorb the fund by taking judgment against the heirs, but must come into equity for a just and ratable distribution; and if he undertakes to proceed against the heirs by levy and sale, on a judgment against them, the administrator may maintain before the chancellor a motion to quash or set aside the sale.² Equality is equity, and one creditor can not, by superior diligence, appropriate a trust fund for creditors generally to his own benefit.

§ 1114. If a sheriff's sale be regular and fair when made, no subsequent fraud or irregularity in anything regarding it will affect its validity or cause it to be set aside. The cause must have existed at the time of the sale.³

1115. A sale will be deemed fraudulent and will be set aside in Illinois, for being made of lands in a distant county from defendant's residence, without his knowledge, and under circumstances rendering it improbable that he would learn of it, more especially when, at the same time, there is ample property of defendant liable to sale on execution in the county wherein defendant resides. Such a procedure is indicative of fraud, and will not be upheld if application be made, in proper time and manner, to set the sale aside.⁴

§ 1116. Where there is such misdescription of the premises

¹ *Mulks v. Allen*, 12 Wend. 253; *Ontario Bank v. Lansing*, 2 Wend. 253, 260.

² *Helm v. Darby*, 3 Dana, 185.

³ *McCollum v. Hubbert*, 13 Ala. 289.

⁴ *Hamilton v. Quimby*, 46 Ill. 90.

that the purchaser can take nothing by his purchase, the sale will be set aside on application of the purchaser.¹

§ 1117. So, where the defendant in execution has no interest in the premises sold, and is not in possession, so that the buyer takes nothing, the court will, under certain circumstances, set aside the sale.²

§ 1118. Though a bid may be received, if fairly made, and publicly cried at the time and place of sale, notwithstanding it is made by letter; yet, if it be not publicly announced, but be received and privately noted in the house, instead of at the door of the place of sale, with publicity, or if there be any other indications of unfairness, the sale will be set aside.³

§ 1119. In *Davis v. Campbell*,⁴ which was a direct proceeding to set aside a sale of lands on execution, the Supreme Court of Indiana hold, that where the statute inhibits the sale of the lands in fee, until the rents and profits be first offered for a term of years without finding bidders, that a sale of the fee of the realty in the first instance, without first offering the rents and profits, is erroneous, and will be set aside. And that where the statute declares that the realty is not to be sold without appraisement, and a sale is made in disregard thereof, that such sale is unauthorized, and will be set aside. And so if the statute give the debtor the right to select the property to be levied and sold, and the right is denied him, and a sale made in disregard of it, such sale also will be set aside. The court in that case make no decision, they say, as to whether the sale would or would not have been held void collaterally, but remark that "a sale will be set aside as erroneous in a direct proceeding for that purpose, when it would not be held void in a collateral suit."

§ 1120. Where a sheriff's sale of land was made under three writs of execution, the senior one of which being the first, if valid, to be satisfied, was void, such sale was held invalid, and was ordered to be set aside.⁵

§ 1121. And so two writs of execution, being at the same time in the hands of an officer for levy and sale against one and

¹ *McPherson v. Foster*, 4 Wash. C. C. 45; *Hughes v. Streeter*, 24 Ill. 647.

² *Rocksell v. Allen*, 3 McLean, 357.

³ *Dickerman v. Burgess*, 20 Ill. 266.

⁴ 12 Ind. 192.

⁵ *Brown v. McKay*, 16 Ind. 484; *Hutchins v. Doe*, 3 Ind. 528; *Clark v. Watson*, 2 Ind. 400.

the same execution debtor, the senior one of which writs was subject to the valuation of appraisement law, and the other not, a sale made thereon, not in accordance with the valuation law, was held irregular and was set aside.¹ Such were the rulings in the Supreme Court of Indiana.

§ 1122. But in Wisconsin it is held that an execution sale on two writs, one of which is void and the other valid, will confer title under the valid writ.²

§ 1123. Where the execution plaintiff is purchaser at sheriff's sale, by a description so defective that nothing passes by the sale, the purchaser "has an equitable right to have the levy and sale set aside, and an execution awarded, by which he can have the benefit of his judgment." But it must be done by the court. The clerk has no power, being a ministerial officer, to set aside a levy or sale, or to vacate an entry of satisfaction. These are judicial acts, and require the exercise of a judicial power equal to that which rendered the judgment.³

§ 1124. If a sheriff omit to give the proper notice of an execution sale, and a person cognizant of that fact induce the officer to sell without notice, by giving him a bond of indemnity, and then becomes the purchaser, such conduct of the sheriff is illegal, and the purchaser being *particeps criminis* to it, the sale is illegal, erroneous, and void for fraud, and will be set aside.⁴

§ 1125. The endorser of a mortgage note has such an interest as will entitle him to prosecute proceedings to set aside the judicial sale of the mortgaged premises, and more especially so if the mortgageor or payor of the note be insolvent. Consequently, where the whole amount of the mortgage debt was estimated by the appraiser, in appraising the lands, as resting on the lands so appraised, when other lands were also liable therefor, and thereby diminishing its appraised value, and the land was then sold in bulk, without an effort to sell it in separate parcels, it was held, that for these irregularities such endorser was entitled to have the sale set aside for his own protection as such endorser.⁵

§ 1126. The statute of Iowa, (Revision of 1860, Sec. 3318, which section has been incorporated into the Code of 1873, Sec.

¹ Harrison *v.* Stipp, 8 Blackf. 455.

² Herrick *v.* Graves, 16 Wis. 167.

³ Hughes *v.* Streeter, 24 Ill. 647.

⁴ Hayden *v.* Dunlap, 3 Bibb, 216.

⁵ Whitney *v.* Armstrong, 32 Iowa, 9.

3087,) requiring notice of levy of a writ of execution on lands to be given to the defendant in the writ, applies as well to special executions in mortgage foreclosures as to ordinary executions of a general character.¹

§ 1127. And where a levy and sale is made, under such special execution, of lands in actual possession of the execution debtor, without giving him the notice required by the statute, the court will, on proper application, made in due time, set the sale aside; if by motion, under the statute, the application is to be made "at the same, or the term next thereafter."² But doubtless the sale would be set aside for the same cause on petition, within any reasonable time, before the rights of innocent persons intervene. The remedy by motion is not exclusive.

§ 1128. And so, when an attachment or execution levy is so grossly excessive as to raise the presumption of unfairness, and as to amount to oppression, and valuable lands are sold on execution in a body for a sum greatly below their real value, the sale, where rights of innocent persons have not attached, will be set aside; and especially where the attorney of the plaintiff is the execution purchaser. And in such case, in answer to the objection of selling *en masse*, it will not be inferred that the officer first offered a smaller portion of the land without obtaining a bid; but the inference will be rather that of misconduct on his part in that respect. The Supreme Court of Iowa, Beck, Justice, in this respect, hold the following language: "It can not be presumed that the proceeding upon the execution, beginning in the violation of law and duty, and resulting in injustice and oppression, was made valid by obedience to the law in its intermediate steps."³

§ 1129. In Wisconsin it is held that the sale of real property as a whole tract, when by statute it is directed to be sold in parcels, though not void, is voidable at the discretion of the aggrieved party, and on application therefor; but that such application, unless prevented by mistake, fraud, or other legal excuse, must be made within the time allowed by law for redemption from the sale. And that a subsequent mortgagee can not apply to set the sale aside, but must seek his equitable right by action to redeem.⁴

¹ *Fleming v. Maddox*, 30 Iowa, 239.

² *Ibid.*

³ *Cook v. Jenkins*, 30 Iowa, 453.

⁴ *Raymond v. Pauli*, 21 Wis. 531; *Griswold v. Stoughton*, 2 Oregon, 61.

§ 1130. The courts will sometimes interfere by injunction to prevent delivery of a deed, when different parcels of land have been sold in mass, at a price greatly under value; but the relief will be afforded on the principle of doing equity, when equity is asked, and therefore the judgment debtor asking the injunction will be required to pay off the judgment when the injunction is made perpetual.¹

§ 1131. In the case of *Ballance v. Loomiss*, here cited, the plaintiffs in execution were the purchasers at sheriff's sale, hence the requirement in the decree that payment be made of the judgment.

§ 1132. An execution sale of land and deed thereon, though as to the description of the land so uncertain as to render it inoperative or void at law, in an action of right, will not be set aside or treated as void in a proceeding in chancery, in the course of which it is made to appear, that the very lands intended to be levied and sold, were levied, sold and conveyed, and that though the irregularity in that respect is against the execution purchaser, yet the equity of the case is on his side, and in favor of sustaining the sale and conveyance.² In the case here cited, of *Hackworth v. Zollars*, the court say, MILLER, Justice: "The appellants insist, that the sheriff's deed is void for uncertainty in the description. This objection would perhaps be good if defendants were suing at law in ejectment. But plaintiffs are asking a court of equity, to quiet the title to this land in them, and the defendants aver facts which in equity make it their property. These facts the demurrer confesses. The plaintiffs admit that this very same land was levied on, under the execution issued upon the judgment of the Wapello district court, in favor of the State Bank of Indiana, against Charles F. Harrow; that this very same land was sold by the sheriff to Hall & Wilson; but they (the plaintiffs) endeavor to avoid the effect of this, by pointing out a defect in the description of the land thus sold in the sheriff's deed, and in equity, to take advantage of such defective description. There is no equitable principle upon which they can be permitted to do this."

Equity will not avoid a sale for mere irregularity, nor for

¹ *Ballance v. Loomiss*, 22 Ill. 82.

² *Hackworth v. Zollars*, 30 Iowa, 435, 438; *Glenn v. Malony*, 4 Iowa, 314, 820; *Dygert v. Pletts*, 25 Wend. 403.

uncertainty of description, rendered sufficiently certain in the very proceedings by which it is sought to be set aside. It is not the office of the chancellor to relieve upon grounds merely technical.

§ 1133. Execution sales of the realty will be set aside when the sale is for an under-value, and is made under the influences of rumors calculated to prevent competition in bidding, although such rumor be not traceable to the purchaser.¹

And so, if the sale be for the whole judgment, when the judgment is payable by installments, and before all the installments are due.²

But the general rule as to inadequacy of price prevails in Delaware, that such sales will not be set aside on that account, alone, unless the inadequacy is so gross as to shock the sense of reason and of justice.³

§ 1134. Sales in cases where judgment is procured by fraud, of which the purchaser is cognizant, or is chargeable in law, with notice of, as also sales to one who fraudulently combines with others to buy at an under-value, and thereby procures the purchase at a sacrifice, will be treated as fraudulent and set aside.⁴ And this, too, whether the property sold be real or personal.

§ 1135. And so an execution sale, brought about, or procured to be made by fraud, and at which the execution plaintiff is purchaser, of the lands so sold, will be set aside in equity on payment of the amount of the judgment, or other proper relief will be given by decreeing the title procured at the execution sale, to be vested in the complainant. Thus, where one purchased real property, and gave his note for the purchase money, and suffered judgment thereon under promise of indulgence, and the plaintiff in the judgment in violation of his promise, executes, and caused to be sold, and buys in the property without the knowledge of the judgment debtor, equity will set aside the sale or cause conveyance of the title procured thereat, to the execution debtor, on payment of the amount due from him.⁵

¹ Underwood *v.* Jeans, 4 Harr. (Del.) 201.

² The State *v.* Platt, 5 Harr. (Del.) 42.

³ Rogers *v.* Ocheltree, 4 Houston, 452. But if objection to confirmation be made as for want of notice of sale, then proof of notice will be required. *Ibid.*

⁴ Underwood *v.* McVeigh, 23 Gratt. 409.

⁵ Wright *v.* Barr, 53 Mo. 340.

§ 1136. Equity will not ordinarily interfere to set aside an execution sale, unless for gross fraud or wrong, and then only on offer to refund the purchase money, after the opportunity of applying to the court from which execution issued, is lost, and the time of redemption is past. And if the property has been conveyed in the meantime to another, the grantee must be also tainted with the fraud, else no relief against such purchase will be given, even if a case be made out in respect to the original execution purchaser.¹

§ 1137. Where a fraudulent sale of lands is set aside in equity, and execution sale is made of the property, only those who are parties to the proceeding to set the sale aside, can come in for distribution of the proceeds of the execution sale. And if there be a surplus, it does not go to the grantor in the fraudulent deed, nor to other and outside general creditors, but is the property of the grantee in the objectionable conveyance. Only those who proceed against him, take precedence over him, in regard to the property conveyed, or funds raised therefrom by execution sale.²

§ 1138. Nor should an execution sale be set aside merely for the reason that the officer sold for a less sum than the plaintiff in the writ has authorized him to bid for such plaintiff, more especially where the property brings more than the two-thirds of its appraised value, as required by law.³ As the officer can not bid, or be a purchaser at his own sale, in his own behalf, it would seem to follow that he can not, as the agent of another, and, therefore, should not assume to bid in property, even by instructions to that effect, for the plaintiff in the writ.⁴

§ 1139. So, for mere irregularities, as for selling *en masse*, or selling at an improper hour of the day, or other irregularities not coupled with fraud, mistake or other cause involving unfair advantages, execution sales *will not be set aside after great lapse of time*. To avail oneself of such objections, they should be made promptly, if there be no insuperable cause of delay.⁵

¹ Hay *v.* Baugh, 77 Ill. 500.

² Todd *v.* Neal's Admir., 49 Ala. 260.

³ Moore *v.* Pye, 10 Kan. 247.

⁴ Ibid.

⁵ Rigney *v.* Small, 60 Ill. 416; Jackson *v.* Spink, 59 Ill. 404; Osgood *v.* Blackmore, 59 Ill. 261; Winchell *v.* Edwards, 57 Ill. 41; Fergus *v.* Woodworth, 44 Ill. 374; Wimberly *v.* Hurst, 83 Ill. 160.

And being present at the sale, without making any objections to the same, or to the manner thereof, or any irregularity connected therewith, will raise a presumption of acquiescence therein, which, with subsequent long silence on the subject, will act by way of estoppel to prevent advantage from being taken thereof.¹

§ 1140. A valid levy is not affected by a subsequent invalid sale;² and so a sale valid and regular in itself, is not to be abrogated or set aside by reason of the officer's omission to make a proper return thereof, or to execute to the purchaser such evidence of title as he is entitled to in law.³

A sale will not be set aside for such omission. The remedy is, to enforce performance of duty upon the officer of the law, to which enforcement the power of the court is fully competent.⁴

§ 1141. Whatever presumptions may prevail to sustain a sale of lands on execution, where judgment, execution and sheriff's deed are shown, without any evidence as to the sufficiency or insufficiency of the notice, or selling in conformity to the notice, yet if it be affirmatively shown that the sale was made on a different day than the one named in the notice of sale, as if the notice be for the 30th day of June, and the return and deed show the sale to have been made on the 14th of July, and there is no statement of any adjournment of the sale to the latter day, the sale will be set aside.⁵

V. FOR REVERSAL OF JUDGMENT.

§ 1142. It is a principle well settled, that where, at an execution sale, the plaintiff in execution, or owner, or beneficiary of the judgment, becomes the purchaser, and the judgment be afterward reversed, that the sale will, on motion or on any other proper and timely application, be set aside. That the defendant will be entitled to be placed in the same position which he occupied before the rendition of the judgment, and to have restitution of whatever he has lost by the sale, provided the same, or the title thereto, has not passed out of such purchaser to a *bona*

¹ Winchell *v.* Edwards, 57 Ill. 41.

² Barnes *v.* Kerlinger 7 Minn. 82.

³ Ibid.

⁴ Ibid.

⁵ Wheatley *v.* Terry, 6 Kan. 427.

fide purchaser, or in some manner become subject to some right, equity, or lien *bona fide* acquired by an innocent person.¹ Or the defendant may have his action for damages against the creditor or owners of the judgment, as for instance an assignee thereof, who becomes the execution purchaser.²

And the same principle applies, and will be enforced, where the purchase at the execution sale is made by the agent of the plaintiff or beneficiary of the judgment, or by his or their attorney in charge of and prosecuting the proceedings, or by any other person for or in privity of interest with the plaintiff or beneficiary of the judgment, so long as the property remains clear of *bona fide* rights of innocent third persons.³

§ 1143. But the contrary is the rule when the purchaser at the sheriff's sale is an innocent third person and is a *bona fide* purchaser, who has paid the purchase money before obtaining knowledge of the reversal of the judgment.⁴

§ 1144. In the case of *Goodwin v. Mix*,⁵ the Supreme Court of Illinois hold the following language in regard to the effect of a judgment and sale to a *bona fide* purchaser: "The complainant's counsel made a point here that the judgments confessed by the Woodworths in favor of Fridley were irregular, and they are attacked on that ground. It is sufficient to say an objection of this character can not be sustained in this suit. Until reversed for irregularity they can be enforced, and if reversed, a *bona fide* purchaser under them would be protected." And such is

¹ *Gott v. Powell*, 41 Mo. 416; *Corwith v. State Bank of Illinois*, 15 Wis. 289; *McBain v. McBain*, 15 Ohio St. 337; *Hannibal & St. Jo. R. R. Co. v. Brown*, 43 Mo. 294; *McJilton v. Love*, 13 Ill. 486; *Dater v. Troy Turnpike & R. R. Co.*, 2 Hill, 629; *Winston v. Otley*, 25 Miss. 456; *Hubbel v. Broadwell*, 8 Ohio 120, 127.

² *Reynolds v. Harris*, 14 Cal. 667; *Johnson v. Lamping*, 34 Cal. 293; *Reynolds v. Hosmer*, 45 Cal. 616; *Bank of U. S. v. Bank of Washington*, 6 Pet. 8, 15; *McJilton v. Love*, 13 Ill. 486. And so if amount of judgment be reduced in an appellate court after sale. *Johnson v. Lamping*, supra. But of a proceeding to set the sale aside, if there be an election to take such, the adverse party must have notice. *Eckstein v. Calderwood*, 34 Cal. 658.

³ *Hannibal & St. Jo. R. R. Co. v. Brown*, 43 Mo. 294; *Gott v. Powell*, 41 Mo. 416.

⁴ *Stinson v. Ross*, 51 Me. 556; *Guiteau v. Wisely*, 47 Ill. 433; *McLagan v. Brown*, 11 Ill. 519; *Clark v. Pinney*, 6 Cow. 298; *Hubbel v. Broadwell*, 8 Ohio, 120; *Goodwin v. Mix*, 38 Ill. 115; *Voorhees v. The Bank of U. S.*, 10 Pet. 449.

⁵ 38 Ill. 115.

the general doctrine. In such case the defendant in the judgment, whose property is thus taken from him, must look for his remedy over against the plaintiff who may have received the proceeds of it. The innocent purchaser is not to bear the loss.

VI. RETURN OF THE PURCHASE MONEY.

§ 1145. A purchaser of lands at sheriff's sale, has no claim on the plaintiff in execution for return of the purchase money where the sale is void, or the execution debtor had no interest in the property sold; and he can not maintain a suit either in law or equity against such plaintiff for the same.¹ Nor can he recover for the same, at law, against the execution debtor; but he may in equity.²

§ 1146. Such purchaser has no right, however, to be subrogated into the place and rights of the execution plaintiff, so as to thus assume the character of a judgment creditor, for by the application of the purchase money paid by him, the judgment is extinguished to the extent of the amount so paid.³

§ 1147. But where the execution plaintiff is himself the purchaser, and the sale passes no title, the sale being void, or the property not being subject to sale on execution for plaintiff's demand, it is proper for the court to set aside the sale, vacate satisfaction of the judgment, if satisfaction is entered, and allow execution anew on the judgment. So also where the property, though belonging to the defendant at one time, had ceased to be his, by reason of a previous sale under a mortgage which had priority over the plaintiff's judgment.⁴

¹ Dunn *v.* Frazier, 8 Blackf. 432; Julian *v.* Beal, 26 Ind. 220; Hawkins *v.* Miller, 26 Ind. 173. There are, however, some rulings to the contrary, but they seem to have been made where there was unfairness on the part of the plaintiff. Swinger *v.* Hickok, 53 N. Y. 280.

² Dunn *v.* Frazier, 8 Blackf. 432; Hawkins *v.* Miller, 26 Ind. 173; McGhee *v.* Ellis, 4 Litt. 244; Muir *v.* Craig, 3 Blackf. 393; Preston *v.* Harrison, 9 Ind. 1; Pennington *v.* Clifton, 10 Ind. 172; Richmond *v.* Marston, 15 Ind. 134; Julian *v.* Beal, 26 Ind. 220; Seller *v.* Lingerman, 24 Ind. 264; Reed *v.* Crosthwait, 6 Iowa, 219; Ritter *v.* Henshaw, 7 Iowa, 97; Hudgins *v.* Hudgins, 6 Gratt. 320; Bentley *v.* Long, 1 Stroh. Eq. 43; Howard *v.* North, 5 Tex. 315; Fenno *v.* Coulter, 14 Ark. 38; Peltz *v.* Clarke, 5 Pet. 481; Dufour *v.* Camfranc, 11 Martin, 615; Haynes *v.* Courtney, 15 La. Ann. 630; McLean *v.* Martin, 45 Mo. 393.

³ Laws *v.* Thompson, 4 Jones, L. 104; Richmond *v.* Marston, 15 Ind. 134.

⁴ Watson *v.* Reissig, 24 Ill. 281; Henry *v.* Keys, 5 Sneed. 488; Ritter *v.* Henshaw, 7 Iowa, 97; Mason *v.* Thomas, 24 Ill. 285; Lansing *v.* Quackenbush, 5 Cow. 38; Tudor *v.* Taylor, 26 Vt. 444; Adams *v.* Smith, 5 Cow. 280; Ontario Bank *v.* Lansing, 2 Wend. 260.

CHAPTER XVIII.

REDEMPTION OF LANDS FROM EXECUTION SALES.

- I. THE RIGHT OF REDEMPTION.
- II. BY THE EXECUTION DEBTOR.
- III. BY JUDGMENT CREDITORS.
- IV. BY MORTGAGE CREDITORS.
- V. HOW AND WHEN TO BE REDEEMED.
- VI. EFFECT OF REDEMPTION.

I. THE RIGHT OF REDEMPTION.

§ 1148. The right in law to redeem lands from execution sale exists only when given by statute; and the existence of this right in each particular case depends upon the state of the law in that respect at the time and place of creating the liability on which the judgment and execution were obtained.

§ 1149. If by law the right exists at the time when, and place where, the liability is incurred, then the right remains within the same State, when and wherever therein the sale be made; but if the right does not exist when and where the liability is incurred, then there is no redemption from the sale made at such place, although in the meantime a redemption law be there passed.¹

If, however, the liability which is the foundation of the judgment and execution be created in one State, and the judgment and sale be in another, then the right to redeem from the sale will be regulated and controlled by the law of the *forum*, or State in which the judgment is rendered, as it is at the date of the judgment.² This is analogous to the ruling of the courts in relation to valuation laws, or the law of appraisement in execution and other forced sales.³

§ 1150. Generally, where the right of redemption from exe-

¹ Howard *v.* Bugbee, 24 How. 461; Greenfield *v.* Dorris, 1 Snead, 548; Maloney *v.* Fortune, 14 Iowa 417; Rosier *v.* Hale, 10 Iowa, 470; Bronson *v.* Kinzie, 1 How. 311; Oliver *v.* McClure, 28 Ark. 555.

² Hutchins *v.* Barnett, 19 Ind. 15; Doe *v.* Collins, 1 Ind. 24; Same *v.* Same, Smith, (Ind.) 58.

³ Howard *v.* Bugbee, 24 How. 461.

cution sales exists, in favor of the execution debtor, it is also given by statute, if not exercised by him, to judgment and mortgage creditors of such debtor, under certain limitations and restrictions.

§ 1151. The right to redeem lands from execution sale may be created also by agreement of the parties independent of the statutory right to redeem,¹ and will be enforced.

§ 1152. The legal right of redemption, and the terms thereof, are as diversified, perhaps, in the different States, as the States are numerous. Of the particulars of these it is not our purpose to treat; they will be found by reference to the ever-changing statutory enactments.

But the rulings of the several courts on the subject, of a general character, are, in like manner as decisions on other subjects, a sort of common law and guide to the courts and profession as far as applicable, and are therefore attempted to be given. In Illinois, the right of redemption is extended by statute to sales made on decrees of foreclosure of mortgages, in like manner as from sales under ordinary process of execution,² and a decree of foreclosure in that State ordering a sale without redemption is erroneous, and will be reversed.³

§ 1153. A judgment debtor may redeem any one of several separate parcels of land, sold at the same time, but separately, to one and the same purchaser, and under one and the same execution. Not to allow separate redemption (say the court) "would be a prodigious hard case."⁴

As a means of enabling debtors to exercise this right of redeeming separate parcels separately, we find here an additional reason, wherever lands are subject by statute to redemption, for requiring sales of separate and distinct parcels to be made on separate bids. Otherwise there would be no standard of values

¹ *Wallis' Heirs v. Wilson*, 84 Miss. 857; *Southard v. Pope*, 9 B. Mon. 261; *Miller v. Lewis*, 4 N. Y. 554; *Lillard v. Casey*, 2 Bibb, 459.

² *Farrell v. Parlier*, 50 Ill. 274. And so in Iowa, in mortgage sales, in foreclosures under the statute, and sales made on special execution, the debtor may elect to have the land sold subject to redemption, or under the appraisal law without redemption. *Davis v. Spaulding*, 36 Iowa, 610.

³ *Farrell v. Parlier*, *supra*. In this case, the court, speaking of the Illinois statute, say: "This section was intended to and does prohibit sales of mortgaged lands, under a decree of foreclosure, without redemption. It then follows that the decree was erroneous in ordering a sale without redemption."

⁴ *Robertson v. Dennis*, 20 Ill. 313.

by which any one tract could be separately redeemed, and the debtor would be subjected to the oppression of redeeming the whole number of tracts together, and in case of inability so to do, lose the whole. The same reason applies as an additional objection to selling real or personal property collectively, together. The one being redeemable and the other not, the separate values relatively bid for each could not be ascertained.

§ 1154. State redemption laws, giving redemption to debtors and creditors from execution, and from mortgage sales, confer new rights, and do not affect the rights of lien creditors existing under the general law to redeem from prior incumbrances, but the same remain as at common law, or as upon equitable principles previously recognized by the courts; and this, too, although a time is limited in which such statutory redemption can be made.¹

The only way to cut off such redemption on junior liens as exist outside of the statute is, by making the holders thereof parties to the proceedings.²

§ 1155. But a mortgage debtor seeking in Arkansas to redeem by aid of equity, can succeed only by paying all other debts due from him to the mortgagee. But, upon general principles, if the mortgagee proceeds to foreclose his mortgage in a judicial proceeding, then the defendant debtor may redeem in court by bringing in simply the amount of the mortgage debt and costs.³

§ 1156. The statutory right of a judgment creditor to redeem lands of his debtor from execution sale is not lost by the bankruptcy of the debtor after date of the judgment, and before offer actually made to redeem;⁴ and if the purchaser at the execution sale be absent, and under the statute the payment and redemption is required to be personally made to him, then the redeeming creditor may, upon the last day of the term allowed for redemption, file his bill in equity to redeem, tendering therewith the amount, and placing the same in court, and thus secure to himself a redemption of the premises.

¹ Holmes *v.* Bybee, 34 Ind. 262.

² Ibid.; Proctor *v.* Baker, 15 Ind. 178; Murdock *v.* Ford, 17 Ind. 52; Brainard *v.* Cooper, 10 N. Y. 356.

³ Anthony *v.* Anthony, 23 Ark. 479, 493; Scripture *v.* Johnson, 3 Conn. 211; Ogle *v.* Ship, 1 A. K. Marsh. 287; Lee *v.* Stone, 5 G. & J. 1; Walling *v.* Acken, McMullen's Eq. 1.

⁴ Trimble *v.* Williamson, 49 Ala. 525.

⁵ Ibid.

II. BY THE EXECUTION DEBTOR.

§ 1157. A purchase at execution sale, under a written agreement for redemption, is not a waiver or a merger of the statutory right to redeem. And though the redemption be limited both by statute and by the agreement to one year, yet the transaction amounts in equity to a mortgage, and the execution debtor will be allowed in equity a reasonable time in which to redeem, irrespective of the one year's time stipulated for in the agreement.¹ And such a promise of redemption made at the time of bidding, which influences others not to bid, or causes the debtor to lessen his efforts to otherwise protect his interests, will be enforced in equity, though the time limited be longer than the statutory time of redemption.² To consummate the redemption in such case, the ten per cent. allowed by law can only be exacted up to the end of the time allowed by law in which to redeem, and six per cent. per annum afterwards.³ And the time allowed by law for redemption may be extended by parol, without interfering with the statute of frauds.⁴

§ 1158. By receiving a part of the redemption money, the purchaser is precluded from treating the sale as absolute after the expiration of the time of redemption;⁵ and thenceforth, after such an acceptance of partial payment of the purchase money, the certificate of purchase and the remaining interest of the purchaser in the land, are but a lien for securing the payment of the balance of the purchase money and interest.⁶

§ 1159. But a mere agreement to extend the time of redemption from execution sale is only a waiver for the time being of the forfeiture of the right to redeem during the time so specified, and will not have the effect of converting the purchase into a lien for repayment of the purchase money.⁷

§ 1160. After the expiration of the legal period of redemption, the purchaser so holding is only entitled to ordinary interest upon the redemption money. The delay of payment then

¹ Wallis' Heirs *v.* Wilson, 34 Miss. 357; Southard *v.* Pope, 9 B. Mon. 264.

² Lillard *v.* Casey, 2 Bibb, 459.

³ Southard *v.* Pope, *supra*.

⁴ Griffin *v.* Coffey, 9 B. Mon. 452.

⁵ Southard *v.* Pope, 9 B. Mon. 261, 264; Ott *v.* Rape, 24 Wis. 336.

⁶ Ott *v.* Rape, *supra*.

⁷ Southard *v.* Pope, *supra*; Ferguson *v.* Smith, 7 Bush, 76.

being a matter of contract between the parties, the statutory rate of interest fixed for the year in which the legal right to redeem exists, no longer applies. Therefore if no rate of interest be fixed by the terms of extension, ordinary legal interest is the result thereof, just as of any other contract to forbear payment of money which does not fix the rate of interest to be paid.¹

§ 1161. And if lands be purchased at execution sale with an agreement between the purchaser and the execution debtor that the latter shall have a right to redeem, and the purchaser should only hold the lands for security for the purchase money and interest, such agreement and purchase create a trust which equity will enforce against the purchaser, although the agreement be a verbal one.²

And so if a purchase at execution sale be made at a price greatly under value, and the purchaser agrees to release the sale on repayment to him by the debtor, equity will enforce the promise.³ And in all such cases, if the execution debtor sell the land, the purchaser under him is subject to the right to redeem the same.⁴ But the contrary is the ruling in Pennsylvania. Such purchase and agreements are there held to be within the statute of frauds, if not reduced to writing.⁵

§ 1162. The execution debtor may redeem without paying off other liens of the execution purchaser, in Minnesota.⁶

But a contrary doctrine is held to be the law in California.⁷ And during the time allowed for redemption, the purchaser in California should pay the taxes; therefore a purchase at tax sale, by himself, for such taxes, will avail him nothing.

¹ Williams *v.* Williams, 8 Bush, 241.

² Ibid.

³ Dupuy *v.* McMillan, 2 Duvall, 555.

⁴ Ibid.

⁵ Kistler's Appeal, 73 Penn. St. 393; Kisler *v.* Kisler, 2 Watts, 323, 327; Robertson *v.* Robertson, 9 Watts, 32, 42; Huines *v.* O'Conner, 10 Watts, 313, 320; Leshey *v.* Gardner, 3 W. & S. 314; Jackman *v.* Ringland, 4 W. & S. 140; Sample *v.* Coulson, 9 W. & S. 62. Otherwise, however, if there be fraud on the part of the purchaser, he may then be charged as *trustee ex maleficio*, if the execution debtor be not a participant in the fraudulent conduct. Ibid. And so, also, if any artifice or influence be used to procure the purchase at an under-value, and it should be successful. Faust *v.* Haas, 73 Penn. St. 295, 301, Sechrist's Appeal, 66 Penn. St. 237.

⁶ Warren *v.* Fish, 7 Minn. 432.

⁷ Vandyke *v.* Herman, 3 Cal. 295.

⁸ Kelsey *v.* Abbott, 18 Cal. 609.

So the judgment debtor may redeem, (and so may his grantee,) though he has conveyed away his right to the land. He may do so to protect his conveyance, and so may his grantee to protect his purchase.¹

The right of the debtor to redeem is not affected by selling the land a second time, either by the same plaintiff or by another; and if the same plaintiff, having a junior judgment, sell it again, then a judgment debtor redeeming from the first sale has priority of right.²

If an execution sale be unknown to the execution debtor, and fraudulent means be used or resorted to for the purpose of preventing the fact from coming to his knowledge, and the proper evidences and records of such sale be not made out within the usual time of redemption, the aggrieved party may, by bill in chancery, filed within a reasonable time in a court of general chancery jurisdiction, enforce redemption. In such case, twelve months after the discovery of the fraud has been deemed a reasonable time, by analogy to the statute limiting the time for redemption, and this, too, against the assignee of the sheriff's certificate, who took with notice.³

§ 1163. If one, by fraudulent means and promises of aid, induce another not to redeem his lands from execution sale, and then procure the title thereto in himself, equity will treat such fraudulent party as a trustee for the execution debtor, and will allow the latter to redeem, although the statutory right of redemption be lost by expiration of the time of redemption limited therefor.⁴

§ 1164. The statutory right of a judgment debtor to redeem lands from execution sale is a *personal* right, and does not depend upon the condition of the title to the land either at the time of

¹ Harvey *v.* Spaulding, 16 Iowa, 397.

² Merry *v.* Bostwick, 13 Ill. 398.

³ Briscoe *v.* York, 53 Ill. 484. In this case Justice BREESE, after reviewing the facts and statements of the bill, which were admitted by demurrer, disposes of the case in the following terms: "It is clear that he (defendant) purchased the certificate with notice of the rights of complainant, and must be affected with all the equities existing against the original purchaser. It seems to us the bare statement of the case is the strongest argument which can be made in support of complainant's right to redeem from the sale, at least within twelve months after the papers evidencing the sale were actually made out."

⁴ Trotter *v.* Smith, 59 Ill. 240.

redeeming or at the time of making the execution sale. The right follows the person, and he may redeem, although he may have sold the land, and thus make good his own sale. He may have sold and conveyed with warranty, while the land was subject to judgment lien or lien by levy, and hence, to make good his warranty, the exercise of his right of redemption becomes a duty to his grantee as well as an obligation on himself. It matters not that his grantee may redeem, under the statute; the rights are concurrent.¹

§ 1165. If the redemption money be paid upon the prior one of two execution levies and sales, so as to redeem the land to the execution debtor, the title still being in such debtor will inure exclusively then to the purchaser under the junior sale, and give title as against both the senior purchaser and the execution debtor, and this too, if redemption be consented to by the first execution purchaser by accepting the redemption money, although the term of redemption under the statute has expired; for his rights as holder of the certificate not being a title, but the mere privilege of obtaining title by taking a deed, the acceptance of the redemption money will be deemed a waiver thereof.² And so, also, if, instead of simply resting on the redemption, the first purchaser quit claims his right in the premises to the execution debtor. The title still inures to the second execution purchaser, under his deed when obtained, all else being legally sufficient.

III. BY JUDGMENT CREDITORS.

§ 1166. The right of judgment creditors to redeem lands of their debtors from execution sales, when given by law, applies alike to creditors whose judgments are rendered before or after the sale.³

But a fraudulent judgment, confers no right of redemption on the plaintiff therein, from an execution sale of the fraudulent judgment debtor's property; nor will it, if supported by an assignment of the right of redemption made without consideration; nor by an execution sale, and purchase thereat, by the

¹ Livingston *v.* Arnoux, 56 N. Y. 507, 514.

² Whiting *v.* Butler, 29 Mich. 122.

³ Couthway *v.* Berghaus, 25 Ala. 393.

plaintiff in such fraudulent judgment and under process issued thereon.¹

§ 1167. When the redemption is made by a judgment creditor after the death of the debtor in execution, it thereby becomes the estate of the deceased debtor, and the title vests in heirs subject, as other lands, to judgment debts. The remedy of the redeeming creditor is to sell on his judgment, and the amount paid for redemption goes to his credit on his bid if the purchase is made by him; and if by another, he is re-imbursted out of the proceeds of sale,² for the amount as part of his demand.

§ 1168. "The land is stricken off to him by legal intend-
ment," say the court. But the redeeming creditor can not issue execution on his judgment and sell, without proper proceedings first taken against the heirs. On a mere revival of the judgment against the administrator, no lien or right attaches to levy and sell the land on a *fieri facias*. Such revival of judgment against the administrator without notice to the heirs was held to be error in *Turney v. Gates*, and was reversed.³ And a judgment so revived and execution sale thereon are void and confer no title on the purchaser.⁴

§ 1169. If a judgment creditor purchase the certificate of sale while the time is yet running for redemption, he will be entitled to the redemption money as assignee, in case any other creditor redeems. And if the creditor so redeeming redeems on a judgment which is junior to the judgment of such assignee, such junior creditor must also pay the amount of the assignee's judgment.⁵ The assignee of a judgment creditor has the same right to redeem as the judgment creditor had.⁶

§ 1170. If the debtor sell his equity of redemption, and the purchaser fail to redeem, a creditor under a junior judgment may redeem after twelve, and within fifteen months, in Illinois.⁷

§ 1171. If two parcels of land be sold as a whole, on execu-

¹ *Arnold v. Gifford*, 62 Ill. 249.

² *Turney v. Young*, 22 Ill. 253; *Keeling v. Heard*, 3 Head, 592.

³ *Turney v. Gates*, 12 Ill. 141; *Turney v. Young*, supra.

⁴ *Turney v. Young*, 22 Ill. 253.

⁵ *Wilson v. Conklin*, 22 Iowa, 452; *Goode v. Cummings*, 35 Iowa, 67. The one last redeeming must pay all that is due to the person from whom the redemption is made. *Ibid.*

⁶ *Sweezey v. Chandler*, 11 Ill. 445.

⁷ *McLagan v. Brown*, 11 Ill. 519.

tion sale, and the plaintiff in a junior execution redeems, and then causes the parcels to be levied and sold separately on his junior writ, bidding them in on his judgment for a sum less than what he paid for redemption, he will be regarded in law as having abandoned his rights under the redemption, and as selling independent thereof.¹

§ 1172. Redemption of lands sold at a master's judicial sale, can not be made by payment to such master where by law the payment is to be to the sheriff. It is inoperative; and moreover the sheriff can not ratify the act of the master in receiving the money, and give validity to the intended redemption.²

IV. REDEMPTION BY MORTGAGE CREDITOR.

§ 1173. In California, though a mortgagee lose his priority by failing to record his mortgage, yet he may redeem under the statute from execution sale, as a creditor; but if he fails to do so, he will have no relief in equity.³ In Iowa, a junior mortgagee, who is not made defendant to the senior mortgagee's suit of foreclosure, is not confined, in redeeming, to the statutory remedy, but may redeem as at common law, or foreclose his mortgage, making the purchaser under the senior foreclosure a defendant and tendering the amount of his purchase money.⁴

§ 1174. If, in case of such sale under the proceedings in foreclosure of the senior mortgage, the purchaser enter into and enjoy the benefit of the mortgaged premises prior to foreclosure by the junior mortgagee, who has had no notice as a party, then the purchaser under the first mortgage will be accountable for rents and profits and waste; but in accounting will be entitled to interest on the mortgage debt, upon the principle of equitable subrogation.⁵

¹ Oliver *v.* Croswell, 42 Ill. 41.

² Littler *v.* People, 43 Ill. 188.

³ Smith *v.* Randall, 6 Cal. 47.

⁴ Anson *v.* Anson, 20 Iowa, 55; Ten Eyck *v.* Cassad, 15 Iowa, 524; Bates *v.* Ruddick, 2 Iowa, 423; Veach *v.* Schaup, 3 Iowa, 194; Heimstreet *v.* Winnie, 10 Iowa, 430; Knowles *v.* Rablin, 20 Iowa, 101. But, *quære?* If the junior mortgagee ought to be subjected to redeem also, as against the costs of such proceeding of the first mortgageor, to which he was not made a party, which costs might have been avoided, after service, by the redemption of the junior mortgagee if he had been made a party to the proceedings.

⁵ Anson *v.* Anson, 20 Iowa, 60; Ten Eyck *v.* Cassad, 15 Iowa, 524; Benedict *v.* Gilman, 4 Paige, 58; Bradley *v.* Snyder, 14 Ill. 263, 267; 2 Wash. Real

§ 1175. Where a case exists for such accounting, the junior mortgagee will not be held to a strict tender, or bringing into court the necessary redemption money on filing his bill.¹

It is believed to be sufficient if, in such case, a readiness to redeem be averred whenever the amount required shall be ascertained by the court. More especially so when the right to redeem is resisted.²

§ 1176. But under the code of Iowa of 1851, which gave no redemption from mortgage sales, it was held that mortgage creditors and other lien holders who had been made parties, could not redeem lands sold under decree of foreclosure after sale to satisfy the mortgage decree. They had already had their day in court.³

§ 1177. Partial redemption is not allowable. Who redeems must redeem the whole interest sold. A purchaser of a part thereof can not redeem such part without paying the whole amount and redeeming the whole, unless such part was separately sold, and then he can. Nor can redemption be made as for an undivided share.⁴

§ 1178. If redemption is of the mortgagee as purchaser, the party redeeming must not only pay the amount bid with interest, but if the bid is less than the decree he must also pay off the decree; he can not redeem, in such case, by simply paying the amount of the purchase money and interest.⁵ "He who claims equity must do equity."

§ 1179. One who mortgages a mortgage, that is to say, one who being the owner of a mortgage on real property, pledges or transfers it to his creditor as collateral security for a debt which he owes, whereby it assumes the character of a mortgage of a mortgage, has no such remaining interest therein as entitles him to redeem from a judicial sale of the mortgaged premises, made in a proceeding wherein such creditor to whom he transferred

Prop. 214, 215; *Goodman v. White*, 26 Conn. 317; *Thompson v. Chandler*, 7 Greenleaf, 377.

¹ *Laverty v. Hall*, 19 Iowa, 526.

² *Ibid.*; *Stapp v. Phelps*, 7 Dana, 296; *Hayward v. Munger*, 14 Iowa, 517; *Rutherford v. Haven*, 11 Iowa, 587.

³ *Cramer v. Rebman*, 9 Iowa, 114.

⁴ *Knowles v. Rablin*, 20 Iowa, 101; *Street v. Beal*, 16 Iowa, 68; *Massie v. Wilson*, 16 Iowa, 390, 396, 397; *Taylor v. Porter*, 7 Mass. 355; *Gibson v. Crehore*, 5 Pick. 146; *Smith v. Kelley*, 27 Me. 237; *Johnson v. Candage*, 31 Me. 28.

⁵ *Knowles v. Rablin*, 20 Iowa, 101, 104; *Johnson v. Harmon*, 19 Iowa, 56, 58.

the mortgage is complainant, and himself and the original mortgageor are defendants, duly in court, when by the decree all the equities of the defendants are foreclosed and barred.¹ For if there be by law a *statutory* right to redeem from mortgage sale, such statutory right inures to the original mortgage debtor alone. And as to the equitable right of redemption which one has to redeem from a mortgage lien, that is extinguished by the decree foreclosing the whole right of all the defendants. The very object in making the assignor of the mortgage a party defendant, is to enable him to redeem by paying his debt and costs, and thus resume the ownership of his mortgage, and if he does not do so, his rights are forever barred.²

§ 1180. And so a junior judgment lien creditor, who has not been made a party in a procedure to foreclose, or ever had therein his day in court, is entitled to redeem the mortgaged premises from a sale under a judicial foreclosure, upon the general principles of equity, by virtue of his judgment lien, and irrespective of the time limited by the statutory privilege of redemption.³ His right to redeem after foreclosure and sale rests upon the same equitable principle as does the right of a junior lien creditor to redeem from a senior lien upon one and the same property. It exists independent of the statute and is only terminated by his having his day in court, and being barred by a decree, or else by lapse of time, or by becoming barred by analogy to those things which are embraced in the statute of limitations.

V. HOW AND WHEN TO BE MADE.

§ 1181. Redemption can only be made in that which is by law a legal tender, in money. The officer is not bound to receive anything else as bank bills, checks, or orders, for money. In some cases it is held that redemption can not be effected by the act of his receiving such substitutes for money, although by its acceptance he renders himself liable for money.⁴

§ 1182. But in others it is held that if such instruments be accepted by him and actually converted into money, so that the

¹ Bloomer *v.* Sturges, 58 N. Y. 168.

² Ibid.

³ Wright *v.* Howell, 35 Iowa, 288.

⁴ Dougherty *v.* Hughes, 3 G. Greene, 92; People *v.* Hays, 4 Cal. 127; People *v.* Baker, 20 Wend. 602.

} money is ready for the holder of the certificate of purchase, it will be a valid redemption.¹

§ 1183. The time of redemption is to be calculated by excluding the first day and including the last, or day of making payment.²

§ 1184. It being a statutory right, the time in which it is to be exercised in the different States will depend on the statutory provisions in that respect. As a general rule it may be made "at any time before the close of the last day allowed by law for that purpose," or of any day within the time allowed by law for redemption. "Business hours are not in this respect regarded."³

§ 1185. Redemption by an unauthorized person, assuming to act as agent, will be valid if ratified or approved by the principal.⁴

§ 1186. In redeeming, strict compliance with the statute is necessary,⁵ unless such compliance be waived.⁶

§ 1187. In *Hughes v. Feeter*,⁷ the Supreme Court of Iowa lay down the rule "that the statutory right to redeem property from execution sale within one year, can not be extended by any act of the party claiming that right, such as a suit to redeem, or the like," without more. Such, too, is the general doctrine.

But where the property, as in the case of *Hughes v. Feeter*, brought but a small proportion of its value, and where that value depended on a protracted suit, calculated to prevent a sale at a fair price, if redeemed and sold again during its pendency, and where suit was commenced in good faith before redemption expired, to test the *bona fides* of the sale, the court enlarged the time of redemption after the expiration of the statutory period.⁸

§ 1188. From an execution sale of several tracts of land separately made on the same writ, the owner may redeem either of them separately, whether they be bought by one or by several different persons.⁹

¹ *Webb v. Watson*, 18 Iowa, 537; *Hall v. Fisher*, 9 Barb. 17.

² *Teucher v. Hiatt*, 23 Iowa, 529; *Bigelow v. Willson*, 1 Pick. 485; *Sims v. Hampton*, 1 S. & R. 411; *Gillespie v. White*, 16 Johns. 117; *Rand v. Rand*, 4 N. H. 267; *Windsor v. China*, 4 Greenl. 298.

³ *Ex parte Bank of Monroe*, 7 Hill, 177; *Teucher v. Hiatt*, 23 Iowa, 529.

⁴ *Teucher v. Hiatt*, supra; *Blackwell*, on Tax Titles, 501, 504, 505.

⁵ *Ex parte Bank of Monroe*, supra; *Hall v. Thomas*, 27 Barb. 55; *Silliman v. Wing*, 7 Hill, 159.

⁶ *Bank of Vergennes v. Warren*, 7 Hill, 91.

⁷ 23 Iowa, 547.

⁸ *Ibid.*

⁹ *Robertson v. Dennis*, 20 Ill. 313.

§ 1189. If the redemption is made of the sheriff by a judgment creditor, it has been held, in Illinois, that the payment should be accompanied by an execution delivered to the officer on the judgment of such redeeming creditor.¹

It is also held, in Illinois, that the money may be paid to the sheriff or to the purchaser.²

§ 1190. From a purchase by the trustee of a *feme covert*, the redemption, in Alabama, is made by payment to such trustee, and not to the *cestui que trust*.³ Otherwise, if the trustee is non-resident.⁴

The receipt by the sheriff of depreciated paper as money from the purchaser, affords no ground for the owner or others to redeem by paying like currency, or its value, in par money. He must pay the full amount in good money.⁵

§ 1191. If the purchaser pays off a prior lien on the premises, the amount must be reimbursed to him by adding the same with interest to the redemption money.⁶

§ 1192. Oversight, neglect, or mere ignorance of the law, is not such excuse for omitting to redeem as will call for relief in equity.⁷

It is held, in New York, (MORGAN, Justice, dissenting,) that under the statute of 1847, requiring redemption from execution sales of lands on the last day of the fifteen months allowed by law in which to redeem, to be made at the sheriff's office, that redemption at the dwelling house of that officer, between nine and ten o'clock in the night of that day, the party redeeming have failed to find the officer during the day at the sheriff's office, is illegal and void for non-conformity to the letter of the act requiring the redemption to take place at the sheriff's office, when the conflicting claimants to redeem might respectively redeem from each other. The court hold that to make the redemption valid, the statute must be strictly conformed to.⁸

¹ Stone *v.* Gardner, 20 Ill. 304.

² Ibid ; Robertson *v.* Dennis, 20 Ill. 313.

³ Barringer *v.* Burke, 21 Ala. 765.

⁴ Couthway *v.* Berghaus, 25 Ala. 393.

⁵ Scofield *v.* Bessenden, 15 Ill. 78.

⁶ Couthway *v.* Berghaus, *supra*.

⁷ Campau *v.* Godfrey, 18 Mich. 27.

⁸ Gilchrist *v.* Comfort, 34 N. Y. 235. In this case the court say: "As the law now exists a redemption by a creditor on the last day of the fifteen months, to be valid and effectual, must be made at the sheriff's office. The

§ 1193. We are not to understand that the objection on which the case of *Gilchrist v. Comfort* turned was that the redemption was made in the night time; for in that there is nothing objectionable in itself. Business hours in reference to redemption are not regarded in law.¹ But it was objectionable, under the circumstances, in like manner as was the place of redeeming, inasmuch as it put difficulties, if not impossibilities, in the way of such other judgment creditors who, under the statute, had a right in like manner and at the same time to redeem of the creditor first redeeming, and so on in turn from one to another so long as there remained judgment creditors willing to redeem, or to bid at what is aptly termed an "auction among the creditors of the land." The real point of objection was that the redemption was not made at the office of the sheriff instead of at his house. Its being in the night time gave weight to the objection in a moral point of view, insomuch as it tended to prevent simultaneous redemptions by other creditors.

VI. EFFECT OF REDEMPTION.

§ 1194. The effect of redemption from execution sale, by the execution debtor or his assigns or grantee, is merely to terminate the sale and restore the property to its original condition. It confers no new right. If the sale was made for a part only of the judgment debt, the land becomes by such redemption again liable for the residue of the judgment. And so, likewise, it becomes thereby liable to sale on any other intervening or subsisting judgment lien older in date than the transfer or assignment made by the judgment debtor, to the same extent as if the judgment debtor had not disposed of his right to redeem, or his interest in the estate.²

In *Stein v. Chambliss*,³ the court say: "The purchase by Cham-

statute is plain and peremptory in this respect and can not be disobeyed or disregarded. It is an express and positive requirement, and must be strictly followed, or nothing is accomplished." See *Ex parte Bank of Monroe*, 7 Hill, 177; *Hall v. Thomas*, 27 Barb. 55.

¹ *Ex parte Bank of Monroe*, 7 Hill, 177; *Teucher v. Hiatt*, 23 Iowa, 529.

² *Teucher v. Hiatt*, 23 Iowa, 529; *Stein v. Chambliss*, 18 Iowa, 474; *Crosby v. Elkader Lodge*, 16 Iowa, 399; *Curtis v. Millard*, 14 Iowa, 128; *Warren v. Fish*, 7 Minn. 432; *Hays v. Thode*, 18 Iowa, 51, 52; *Titus v. Lewis*, 3 Barb. 70; *State v. Sherill*, 34 Ind. 57.

³ 18 Iowa, 475, 476.

bless of Banford's right to redeem the property from the sale to Dougherty, and to Lemp and Sells, conferred upon him no other or better right than Banford himself possessed, and the legal effect of a redemption by him is the same as if Banford himself had redeemed, leaving the property subject to be taken in satisfaction of any subsisting lien or judgment thereon;" and the same court, in *Crosby v. Elkader Lodge*,¹ hold the following language: "If the debtor or his grantee redeem land which has been sold in part satisfaction of a subsisting judgment, the property at once becomes liable to satisfy the unpaid balance of the execution from the moment of such redemption." So in the still earlier case of *Curtis v. Millard*,² the same court review the whole subject, and assert the rule to be, that if during the interval between the sale on execution and delivery of the sheriff's deed to the purchaser, other judgments be rendered against the debtor, where judgments are liens, that they attach as liens against the execution debtor's interest in the premises so sold, and that if there be redemption from such sale, the land is liable to sale on execution to satisfy such subsequent judgments. "That the legal estate of the judgment debtor is not divested by the sale of his land under execution, until after expiration of the time for redemption, and the title has vested in the purchaser by deed from the sheriff." It therefore follows that judgments rendered within that time attach as liens to the premises, subject to be defeated by failure to redeem, and by execution and delivery of the sheriff's deed.

In the same case of *Curtis v. Millard*, the doctrine is broadly asserted by the court that "the purchaser of lands sold on execution, acquires by his purchase no more than a lien upon the lands for the amount of his bid and interest during the time allowed for redemption. He acquires no right or estate upon which he could maintain ejectment, or which could be levied upon and sold for his debts;" that it is simply an inchoate and conditional right to an estate, "liable to be defeated at any time within one year, by the payment of the purchase money and interest." That is, by redemption.

§ 1195. A judgment creditor, or other creditor, in redeeming, is substituted to the execution purchaser's rights. He acquires no new or better rights than the right of those from whom he

¹ 16 Iowa, 399, 405.

² 14 Iowa, 129, 130.

redeems. Therefore, if the purchase is made under a void execution, or an execution issued on a judgment which has been paid, or where the execution itself has been satisfied, then the purchaser at the execution sale having obtained nothing by his purchase, nothing inures to the party redeeming, by virtue of the redemption.¹ Thus it follows that a creditor redeeming from an execution sale takes nothing, and a subsequent execution sale, in his own behalf, in pursuance of such redemption, under the Illinois statute, is also void.²

§ 1196. From sales made in a loyal State during the war of rebellion, of lands belonging to a citizen and resident of a State in rebellion, where no negligence in redeeming attaches to the judgment debtor, the debtor or his representatives will, in equity, by analogy to the statute of limitations, be allowed one year in which to file their bill to redeem, after the obstacles caused by the war have ceased; and where, in such case, the sheriff's deed has intervened, the proper course is to apply by bill to the court of ordinary chancery jurisdiction for relief. If in the meantime the judgment debtor dies, redemption may be thus effected by a bill on the part of his heirs, but upon terms. Not, however, as to such portion of the lands as may have passed by conveyance to innocent purchasers.³

§ 1197. Part payment of the redemption money for lands sold on execution sale during the time in which, by law, the right of redemption exists, and the receipt thereof by the execution purchaser, will not in itself, or without some understanding valid in itself to that effect, entitle the party so paying to complete the redemption after expiration of the time limited by law.

To effect the intended purpose of redeeming from the sale, it should be followed up by completion of payment within the time fixed in which to redeem by law.

¹ *Keeling v. Heard*, 3 Head, 592.

² *Johnson v. Baker*, 38 Ill. 98. Of such sales the Supreme Court say: "They are both void, because they fail to conform to and are in violation of the statute. And it follows, as the judgment is utterly void, that such a sale under it would be equally; and being void, it is not such a judgment as the statute contemplated, as the basis of a sale from which a junior judgment creditor might redeem."

³ *Mixer v. Sibley*, 53 Ill. 61; *Stiles v. Easley*, 51 Ill. 275; *Hanger v. Abbott*, 6 Wall. 532.

⁴ *Stevens v. Irwin*, 76 Ill. 604.

§ 1198. Redemption by a judgment creditor of the undivided interest in lands of his judgment debtor, of lands sold on execution against such debtor and another, and a deed made in pursuance thereof, carries the equitable right only, and that only as against the debtor in the execution under which the redemption is made.¹

§ 1199. The rule under the statute in California seems to be, that the judgment debtor or redemptioner may redeem the property from the purchaser within six months after the sale, and that if property be so redeemed by a redemptioner, then either the judgment debtor or another redemptioner may, within sixty days after the last redemption, again redeem it from the last; and if no redemption be made within six months after the sale, the purchaser or his assigns shall be entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, the time for redemption will then have expired, and the last redemptioner or his assigns will be entitled to a sheriff's deed.²

Durley v. Davis, 69 Ill. 133; *Fischer v. Eslaman*, 68 Ill. 78; *Titsworth v. Stout*, 49 Ill. 78; *Hawkins v. Vineyard*, 14 Ill. 26.

¹ *Boyle v. Dalton*, 44 Cal. 332. Thus, if the debtor does not redeem in six months, a judgment creditor may; and if a redemption or redemptions be made, then, at the end of sixty days from the time of the last redeeming, or after either redemption, a deed may be had.

CHAPTER XIX.

EXECUTION SALES OF PERSONAL PROPERTY.

1.—THE WRIT.

- I. THE WRIT.
- II. ITS LIEN.
- III. WHAT PERSONAL PROPERTY MAY BE SOLD.

2.—THE LEVY.

- IV. WHEN TO BE MADE.
- V. HOW TO BE MADE.
- VI. ITS EFFECT.
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- IX. CONSTRUCTIVE LEVY.

3.—THE SALE.

- X. BY WHOM TO BE MADE.
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- XVI. OFFICERS' FEES AND CHARGES.
- XVII. DISAFFIRMANCE OF EXECUTION SALE.

I. THE WRIT.

§ 1200. The writ of *fieri facias* is the process on which execution sales of personal property were made at common law.¹

It is a common law writ, and is directed to the sheriff of the county, by his official title, commanding him, that of the goods and chattels of the defendant, to be found in his bailiwick, that is, in his county, he levy and cause to be made a sum of money mentioned in the writ, and to have the same before the court on the return day of the writ.²

In olden time, in England, when the monarch held the court in person, the command of the writ was to have the money in court, before the king.

¹ 3 Bac. Abt. Tit. "Execution," 698; 3 Black. Com. 417; 2 Tidd's Prac. 993, 997, (4th Am. ed.)

² Tidd's Prac. 997, (4th Am. ed.); 3 Black. Com. 417.

§ 1201. Sales of personal property, in the American States, to satisfy judgments at law, are usually made on this writ, or one closely assimilated to it, and which, in some States, also run against the lands and tenements of the execution debtor, either absolutely or as an alternative, in case sufficient goods and chattels be not found whereof to satisfy the writ.

§ 1202. Whatever the form of the writ may be, it must substantially conform to the judgment upon which it issues. If it does not, it will, on motion, be quashed.¹

A slight variance, however, will not vitiate the writ, though it may be subject to be quashed therefor before sale thereon; but if it be not quashed, and sale is made thereon, the sale will be valid, if possession of the property be delivered to the purchaser.²

§ 1203. If property be not found on which to levy the *fieri facias*, or its kindred writ as modified by statute, within the lifetime of the writ, then, on return thereof, the proper course is to sue out an *alias fieri facias*, and so on in succession, as a like necessity occurs, a *pluries*, and *alias pluries*; but if there be a levy effected, and from any cause not affecting the validity of the writ or levy, the writ be returned without sale of the property levied, then an order for the issuing of a writ of *venditioni exponas* is to be obtained, and the latter writ thereupon issues to the officer, commanding him to *sell* the property so levied on the former writ of *fieri facias* and remaining unsold. This writ of *venditioni exponas* confers no new or additional authority on the officer, but commands and compels him to do that which he was before authorized and commanded, by the writ of *fieri facias*, to do.³

§ 1204. In Alabama, and some others of the States, if execution issue during defendant's lifetime, and be not executed, then an *alias*, or *pluries*, as the case may be, may issue after his death, whereon personal effects may be levied and sold, (but not the realty without revival of the judgment,) the lien of the first writ having attached to such personality during defendant's lifetime.⁴ If the judgment, however, be against two or more

¹ *Reese v. Burts*, 39 Geo. 505.

² *Williams v. Brown*, 28 Iowa, 247; *Hunt v. Loucks*, 38 Cal. 372.

³ *Johnson v. Lynch*, 3 Bibb, 334.

⁴ *Erwin v. Dundas*, 4 How. 58.

defendants, and one die, execution can not go as against the realty without revival of *scire facias*, but may as to the personality of the survivors.¹

1205. The writ, under all circumstances, must correspond to the judgment substantially; and if one defendant be dead, it must nevertheless run as against them all, but can only be executed against the personal property of the survivor or survivors. Sometimes, however, on suggestion of the death of one of the defendants of record, the writ will be ordered against the survivor or survivors alone.²

§ 1206. The alteration of an execution in any manner whatever, after it has passed out of the hands of the clerk, destroys its vitality and renders it void. All proceedings thereon are in like manner void. The alteration of process will not be tolerated by the law, or courts, under any circumstances.³

In the case here cited, WALKER, Justice, lays down the rule as follows, and no doubt correctly: "If the execution were altered in a material part, it would thereby become void. Courts can never permit such alterations of their process, thereby endangering the rights of parties as effectually as any other species of forgery." If wrong, it should be returned, that by leave it can be amended, or a legal writ issue. A writ issued pending an injunction is void, and dissolving the injunction does not render it valid.⁴

§ 1207. Although process of execution issued upon a *void* judgment is *also* void, yet such is not the case when issued on a judgment merely voidable, or which would be reversable on error. Thus, where a court has general jurisdiction of the subject matter, and obtains jurisdiction of the person of the defendant, then the judgment, however erroneous, will be valid, until reversed or set aside in some legal manner, and an execution issued thereon is of the same vitality as if issued on a judgment wisely and correctly rendered. There can be no collateral impeachment of either the judgment or the writ of execution;

¹ Erwin *v.* Dundas, 4 How. 58; Hildreth *v.* Thompson, 16 Mass. 193.

² Erwin *v.* Dundas, 4 How. 58, 79; Johnson *v.* Lynch, 3 Bibb, 334. In the case last cited, although the writ was quashed, yet it was for other cause than issuing after the death of one defendant. The objection on this point was in effect overruled.

³ White *v.* Jones, 38 Ill. 159, 164.

⁴ Newlin *v.* Murray, 63 N. C. 566.

as where a justice of the peace, proceeding upon a transcript from the docket of another justice whose office has expired, rendered judgment thereon and issued execution, though erroneous in point of law, it was held valid in a collateral inquiry, and the writ was held to be a good defense to the officer levying the same, in an action of trespass for levying and seizing goods thereon.¹

II. ITS LIEN.

§ 1208. At common law, this writ of *fieri facias* bore relation to its date, usually called the *teste*,² and bound the goods and chattels of the defendant from that time, or such thereof as were subject to levy, by which means it became a lien from its date.³

But this relation is taken away in England by statute, and with it the lien, so far as to purchases intermediate between the *teste* of the writ and the time of its actual delivery to the sheriff; and is made to commence only on such delivery as against such purchaser, so as to save intervening *bona fide* sales;⁴ the lien still remains, however, against the goods in the hands of the debtor himself, from the date of the *teste*, and overreaches other writs subsequently issued and levied.⁵

§ 1209. In some of the American States, as in England, at common law, this lien of the writ of execution, in the hands of the sheriff, attaches to the goods and chattels of the defendant in the bailiwick, or county, from the *teste* of the writ.⁶

In others the lien attaches only by the levy;⁷ while in yet another class, the statute of 29th Charles II., is either followed or is substantially re-enacted. In this latter class the lien

¹ Spade *v.* Bruner, 72 Penn. St. 57.

² 2 Tidd's Prac. 999; Erwin *v.* Dundas, 4 How. 58; Dodge *v.* Mack, 22 Ill. 95.

³ 2 Tidd's Prac. 999, 1000, and note *a* (4th Am. ed.); Bouvier's Instit. Sec. 3389; Archb. Civil Plds. Title, "Execution;" 1 Hay. (N. C) 396; Erwin *v.* Dundas, *supra*; Dodge *v.* Mack, *supra*; Love *v.* Williams, 4 Fla. 126; Mercei *v.* Hooker, 5 Fla. 277; Kimball *v.* Jenkins, 11 Fla. 111.

⁴ Stat. 29 Chas. II., Chap 3, Sec. 16.

⁵ 2 Tidd's Prac. 999, 1000, (4th Am. ed.); Erwin *v.* Dundas, 4 How. 58; Woodward *v.* Hill, 3 McCord, 241.

⁶ Harding *v.* Spivey, 8 Ired. L. 563; Union Bank *v.* McClung, 9 Humph. 91; Barnes *v.* Hayes, 1 Swan, 304; Erwin *v.* Dundas, *supra*.

⁷ Reeves *v.* Sebern, 16 Iowa, 234; Field *v.* Milburn, 9 Mo. 492; Gilky *v.* Dickerson, 2 Hawks, 341; Knox *v.* Webster, 18 Wis. 406.

attaches as against the debtor, by delivery of the writ to the proper officer for service, but subject to *bona fide* purchases made before levy.¹

§ 1210. The lien of the original execution is kept alive, by

¹ Ray *v.* Birdseye, 5 Denio. 619, 624; Johnson *v.* McLane, 7 Blackf. 501; Marshall *v.* Cunningham, 13 Ill. 20; Furlong *v.* Edwards, 3 Md. 99; Tabb *v.* Harris, 4 Bibb, 31; McMahan *v.* Green, 12 Ala. 71; Dodge *v.* Mack, 22 Ill. 95. On this subject we avail ourselves of the learned opinion of the Iowa Supreme Court, by DILLON, Justice, in Reeves *v.* Sebern, from which we make the following extract: "The defendant now claims that the execution, though not levied, was a lien upon the goods and chattels of the debtor. We are aware of no decision in this State fixing the *time* when the goods of an execution defendant are bound, whether from the teste of the writ, or from its delivery to the officer, or from actual levy only. This subject is now settled by statute, which provides that execution shall bind only from the time of levy. (Laws 1862, p. 231.) This act was not in force at the date of the transaction now in question, and hence it becomes necessary to state what the law was before the act was passed. At common law the writ of *fit. fa.* bound the chattels of the defendants from its teste. 3 Bouv. Inst. 573, 574; Arch. Civil Pl. Title, 'Execution,' 1 Hay. (N. C.) 396; 2 Id. 57; 2 Hawks, 232; 3 Id. 296. As this had the unjust effect to overreach and defeat sales made even before the writ was delivered to the sheriff, it was remedied by the statute of 29 Charles II. which made the writ binding from the time of its delivery to the sheriff to be executed. We have very few if any decisions as to what the common law in this country is, because the subject is, in most of the States, regulated by express statute. Thus, in New York, the statute of 29 Charles is re-enacted, expressly. Ray *v.* Birdseye, 5 Denio, 624; see, also, 12 Johns. 403. So in Indiana, 7 Blackf. 501; 4 Id. 496; 4 Ind. 255. So in Illinois, 13 Ill. 20; 22 Id. 98. So in Kentucky, 1 Litt. St. 540; 4 Bibb, 31; 2 J. J. Marsh, 421. So in Florida, 4 Flor. 126; and Maryland, 3 Md. 99; and Alabama, 12 Ala. 71; Id. 247; 18 Id. 387. In Missouri, as between two officers the first levy holds, though the writ was delivered last. Field *v.* Milburn, 9 Mo. 492. In California and Ohio, by statute, the lien is from levy only. In North Carolina, where the common law, as a body, is adopted, the lien is from the teste, (8 Ired. 63, and cases *supra*,) and Tennessee follows North Carolina, (9 Humph. 91; 1 Swan, 304.) In the absence of statute, we must conclude that the execution is a lien, either from its teste, as at common law, or only from actual levy. We do not feel bound to adopt the unreasonable and unjust rule of the ancient common law, so unjust, indeed, that it had to be remedied by statute. It does not accord with the policy of our laws, nor harmonize with the decisions on kindred subjects. The whole current of judicial decisions, in this State, has ever, and we think most wisely, been against secret constructive liens, especially when these are set up against purchasers. Barney *v.* McCarty, 15 Iowa; Same *v.* Little, Id.; and Cummings *v.* Long, Id.; Jones *v.* Peasley, 3 Greene, 52; Gimble *v.* Ackley, 12 Iowa, 27. And we are not mistaken in saying that the professional sentiment in this State has always been that executions were not liens on chattels until actual levy. This was the opinion of the court below, and in this respect there is no error." (Reeves *v.* Sebern,) 16 Iowa, 236, 237.

the issuing of an *alias*, or *pluries*, or other subsequent writ resting on the original, in proper time, and will cut off process issued during the period intervening between the time of issuing such subsequent writ, and the issuance of its original.¹

§ 1211. Or the court may order the writ of *venditioni exponas*, to sell the property, if after levy, the *f. fa.* be, from any cause, returned without sale. But this writ should be directed to the same officer who made the levy, when the levy is on personal property, for by the levy a species of property is vested in him for the purpose of satisfying the debt.² Hence, strictly speaking, no issuing of a *venditioni*, in cases of levies on personal property, is ordinarily necessary, for the officer may go, if the levy is made in the lifetime of the writ, and complete the same by sale, although the writ or his own office expire before the day of sale. He may sell, nevertheless, and complete the execution of the writ according to its command.³

§ 1212. In Kentucky the death of the defendant in execution abates the writ, and no further proceedings can be had thereon; but it does not discharge the lien of the levy, if there be a levy, and equity will enforce the same.⁴

§ 1213. It is held in Illinois, that the death of the defendant after the teste of the execution and before it comes to the hands of the officer, destroys its vitality, and that no valid levy can be made thereon;⁵ but it is there held also, that the lien of the writ is fixed by delivery to the officer, and that, therefore, if defendant die after the writ comes to the officer's hands, that such officer may go on and execute the writ by levy and sale.⁶

§ 1214. In Delaware, the writ of execution is a lien on the goods and chattels of the defendant from the time at which it is delivered to the officer for service.⁷

Its issuance raises a presumption of satisfaction of the judgment until by a return thereof it is made to show the contrary.⁸

¹ Brasfield *v.* Whitaker, 4 Hawks, 309.

² Clark *v.* Sawyer, 48 Cal. 133.

³ Ibid.; Tarkinton *v.* Alexander, 2 Dev. & B. Law, 87; Rogers *v.* Darnaby, 4 B. Mon. 238.

⁴ Holeman *v.* Holeman, 2 Bush, 514; Wagnon *v.* McCoy, 2 Bibb, 198.

⁵ The People *v.* Bradley, 17 Ill. 485.

⁶ Dodge *v.* Mack, 22 Ill. 93, 96.

⁷ Stuarts *v.* Reynolds, 4 Harr. (Del.) 112; Stockley *v.* Wadman, 1 Houston, 850. But writs of attachment are a lien only from their levy. Ibid.

⁸ Bishop *v.* Spruance, 4 Harr. (Del.) 114.

Therefore, no *alias* can issue, without a judicial order, before the first writ is returned.¹

If the writ be against one member only of a co-partnership firm, and individual property be not found, the officer may seize or levy on the co-partnership goods and sell the interest therein of the debtor in execution. And if the officer deems it necessary, he may take the whole into his actual possession, and the firm, or other partner, can not maintain replevin for the same.²

§ 1215. In New York, the execution is a lien upon the personal property of the debtor from the time of its legally and regularly coming into the hands of the officer.³ But that lien does not vest any property in him, or authority to take or remove it, without a levy. It is the levy which confers upon the officer the right to the possession of the property, and such levy must be made during the lifetime of the writ.⁴ If the levy be actually made during the lifetime of the writ, then the lien created by handing the writ to the officer is continued thereby, and a sale made accordingly will overreach in priority a mortgage filed for record on the same day of the delivery of the writ to the sheriff, but at a later hour of that day.⁵ The execution in the hands of the officer creates a lien for the benefit of the plaintiff in the writ, and the sheriff is the mere *minister* of the law to procure for the creditor satisfaction of his debt. To this end he is vested with the right, after he has found and levied on the property, to hold possession until the sale thereof, and to sell and deliver the same to the purchaser.⁶ If this possession of the officer be violated, an action therefor lies in his behalf.⁷

But if the officer neglect to make an actual levy before the return day of the writ, he loses all right to levy and to any control over the property, and also the lien of the writ is lost.⁸

§ 1216. The writ of *fieri facias* is a lien, in Virginia, from its delivery, on the personal effects of the execution debtor, except such property as is exempt from execution by law, and except as

¹ Bishop *v.* Spruance, 4 Harr. (Del.) 114.

² Davis *v.* White, 1 Houston, 228.

³ Hathaway *v.* Howell, 54 N. Y. 97.

⁴ Ibid.; Van Rensselaer *v.* Kidd, 6 N. Y. 333; Vail *v.* Lewis, 4 Johns. 450; Devoe *v.* Elliot, 2 Caines, 243.

⁵ Hathaway *v.* Howell, 54 N. Y. 97.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

against *bona fide* purchasers, that is purchasers in good faith, for a valuable consideration and without notice of the writ.¹

This lien continues, if there be not satisfaction, even after return of the writ, and only ceases after the right to have a new writ ceases, or it may be suspended by a forthcoming bond, which is in lieu of it.² And though not issued until after a year and a day, the time when, in Virginia, a judgment becomes dormant, yet the writ is not, by reason thereof, void, but only voidable.³ And if an *eligit* be issued against a person who is bankrupt, but on a judgment rendered before he became bankrupt, yet the writ is leviable only on such property as is subject to the judgment lien. In such case the other effects and property belong to the assignee in bankruptcy, and it is said that the sheriff must, at his peril, take notice of such bankruptcy.⁴

§ 1217. So, in Arkansas, the execution on a personal judgment is a lien on all personal property in the county which is subject to the writ, from the time it comes into the hands of the officer.⁵

But the levy will not retain the lien as against the subsequent levy of other writs, if the property, after the first levy, be left in the possession of the debtor.⁶

If the defendant die after the officer receives the writ, he can not levy and sell, for by the death the writ is suspended.⁷ If, however, there be a levy before the death of the defendant, then the officer may go on and sell.⁸ If levied, it thereby becomes a specific lien on the particular property levied on, vesting a sort of property in the officer, whereas the unlevied writ, though a lien, is not such specifically. Therefore, in the latter case, the satisfaction is to be had in probate, where the general property is converted into money; but in case of levy the officer may sell and satisfy the same, for the property being, by the levy, vested in the officer, it does not go into the hands of, or inure to, the

¹ Charron *v.* Boswell, 18 Gratt. 216; Puryear *v.* Taylor, 12 Id. 401.

² Ibid.

³ Beale *v.* Botetourt, 10 Gratt. 278.

⁴ McCance *v.* Taylor, 10 Gratt. 581.

⁵ Isbell *v.* Epps, 28 Ark. 35; Pettit *v.* Johnson, 15 Ark. 55; Davis *v.* Oswalt, 18 Ark. 414; James *v.* Marcus, Id. 421.

⁶ Tucker *v.* Bond, 23 Ark. 268; Slocomb *v.* Blackburn, 18 Ark. 309.

⁷ State Bank *v.* Etter, 15 Ark. 272.

⁸ Ibid.

administrator.¹ A second levy, before discharge of the first, is irregular, whether on land or personality; yet if a sale is made thereon to a *bona fide* purchaser, it is not for such irregularity void.² A second levy may be set aside or quashed when a prior one still exists, and so may the second process, if both are of the same kind; but the first levy ought to be first disposed of in some regular way. It should either be vacated or else satisfied by sale, if a sale be in law permissible, and if not permissible for any reason not affecting the levy, then a writ of *venditioni exponas* should issue to sell the property levied on.³

§ 1218. A delay in the removal of the property levied on and in its sale, by consent of the execution creditor, will postpone the lien of the levy on personal property in favor of a junior execution and levy upon the same property.⁴

III. WHAT PERSONAL PROPERTY MAY BE SOLD.

§ 1219. On the writ of *fieri facias*, at common law, in England, everything that is chattel belonging by legal title to the defendant, except necessary wearing apparel, was liable to be levied and sold; also, leases or terms for years, which are chattels real; likewise growing grain, which went to the executor as personality; and all such fixtures as might be removed by the tenant, if the tenant was the defendant in execution.⁵

§ 1220. But such things as belonged to the freeho'd and descended to the heir, as furnaces, growing apple trees, and other things attached to the soil or tenement, could not be seized and sold on execution.⁶ Neither could judgments, accounts, bonds, bank notes and other choses in action;⁷ nor goods which were mortgaged or pawned for debt;⁸ nor goods distrained, or demised

¹ State Bank *v.* Etter, 15 Ark. 272.

² Pettit *v.* Johnson, 15 Ark. 55.

³ Anderson *v.* Fowler, 3 Eng. 389.

⁴ Acton *v.* Knowles, 14 Ohio St. 18.

⁵ 2 Tidd's Prac. (4th Am. Ed.) 1001, 1002, and note; 3 Bac. Abt. "Execution," 698.

⁶ 2 Tidd's Prac. supra; Craddock *v.* Riddlesbarger, 2 Dana, 206.

⁷ 2 Tidd's Prac. supra; McGehee *v.* Cherry, 6 Geo. 550; Taylor *v.* Gillean, 23 Texas, 508; Rhoads *v.* Megonigal, 2 Penn. St. 39; Ingalls *v.* Lord, 1 Cow. 240; McClelland *v.* Hubbard, 2 Blackf. 361; Osborn *v.* Cloud, 23 Iowa, 104.

⁸ 2 Tidd's Prac. 1001; 3 Bac. Abt. "Execution," 689; Johnson *v.* Crawford, 6 Blackf. 377.

for years, or goods seized and held on a prior execution;¹ nor fixtures of a house which was the freehold of the execution defendant.²

§ 1221. Property in the hands of a receiver appointed by a court is not the subject of execution levy or sale. It is in the custody of the law. Nor is it subject to an attachment or other interfering process. If a party has rights as against it, application should be made to the court, which controls both receiver and property, for the allowance and adjustment of such rights.³ In the case cited from Iowa, the Supreme Court of that State, COLE, Justice, say: "The property levied upon by the appellants was, at the time of their levy, in the hands of a receiver appointed by the court. It was therefore in the custody of the law, and not properly or legally liable to seizure by an officer under an execution."

§ 1222. In most of the several States, as a general rule, all movables, including bank notes and money not expressly exempt by statute, are subject to levy, and except money, to sale on execution.⁴ Money, when levied, is applied on the writ by the officer.⁵

§ 1223. In some States choses in action and debts due to the defendant,⁶ shares of stocks in joint stock companies and in corporations⁷ may be levied and sold, as also the mortgagee's right to personal property mortgaged to him, after forfeiture by non-payment when due;⁸ but not the interest of the mortgageor after such forfeiture.⁹ But if the interest be for a fixed time, then it is liable to levy and sale.¹⁰ Also growing grain and other crops of

¹ 2 Tidd's Prac. 1002, 1003.

² 3 Bac. Abt. "Execution," 705; Winn *v.* Ingilby, 5 B. & A. 625.

³ Martin *v.* Davis, 21 Iowa, 535; Drake on Attachts. Secs. 492, 504.

⁴ Handy *v.* Dobbin, 12 Johns. 220; Holmes *v.* Nuncaster, Id. 395.

Hamilton *v.* Ward, 4 Tex. 356.

⁵ Collier *v.* Stanbrough, 6 How. 14.

⁶ Stamford Bank *v.* Ferris, 17 Conn. 259.

⁷ Ferguson *v.* Lee, 9 Wend. 258. But not a lost and unrecorded mortgage, where the debt is not evidenced by any bond or note. Gale *v.* Battin, 16 Minn. 148.

⁸ Lamb *v.* Johnson, 10 Cush. 126. (Unless he have an interest for a fixed time, such interest may be levied and sold. See Rindskoff *v.* Lyman, 16 Iowa, 260.) Marsh *v.* Lawrence, 4 Cow. 467; Otis *v.* Wood, 3 Wend. 500; Campbell *v.* Leonard, 11 Iowa, 489; Durfee *v.* Grinnell, 69 Ill. 371. But it may be before forfeiture. Ibid.

⁹ Hull *v.* Carnley, 11 N. Y. 501; Mattison *v.* Baucus, 1 N. Y. 295; Rindskoff

annual planting can be levied and sold as at common law in some of the States, it is said, and the officer and others entering to levy, sell, or buy will not be trespassers.¹ But whether the term "annual productions," used by jurists, when treating of this principle, extends legitimately to such crops as grow in the ground, is by no means clear to our mind, for they can not be gathered without digging up and disturbing the land, which it appears to us, can not be legally done in virtue of any sale of a mere personalty. In others of the States, crops may only be levied and sold, when standing on the ground, after they have ripened or matured.²

§ 1224. In *Craddock v. Riddlesbarger*,³ the Supreme Court of Kentucky, Chief Justice ROBERTSON, hold the following language on this subject: "Although such annual productions or fruits of the earth, as clover, timothy, spontaneous grasses, apples, pears, peaches, cherries, etc., are considered as incidents to the land in which they are nourished, and are therefore not personal; nevertheless, everything produced from the earth by annual planting, cultivation and labor, and which is therefore denominated, for the sake of contradistinction, *fructus industriae*, is deemed personal, and may be sold." And the purchaser, by the same authority, has right of ingress and egress to cultivate, preserve, and remove the same, but acquires no interest in the land itself other than such as is for the time being necessarily incident to his right to such growing *fructus*.

§ 1225. The interest of one of several tenants in common in personal property, may be levied and sold on execution for the

¹ Lyman, 16 Iowa, 270. In this case DILLON, Justice, said: "The effect of such a sale is the same as if made by the mortgageor in the ordinary way. It does not defeat the mortgage, or destroy, or in any manner impair the legal right of the mortgagee. It gives the purchaser the right to take possession of and use the property until the day of payment, or until the stipulated time expires; and it gives such purchaser the further right, by transferring to him the equity of redemption, to pay off the mortgage debt, thereby extinguishing the lien of the mortgage, and thus making his title absolute."

² Whipple *v.* Foot, 2 Johns, 418; Hartwell *v.* Bissell, 17 Johns. 128; Penhal-low *v.* Dwight, 7 Mass. 34; McKenzie *v.* Lampley, 31 Ala. 526; Parkham *v.* Thompson, 2 J. J. Marsh. 159; Pierce *v.* Roche, 40 Ill. 292; Lindley *v.* Kelley, 42 Ind. 294. And so may the rental share of the landlord in the growing crop of the tenant, and a sale by the landlord after the officer receives the writ, is cut off by the lien thereof. *Ibid.*

³ Shannon *v.* Jones, 12 Ired. L. 206.

⁴ 2 Dana, 206; Parkham *v.* Thompson, 2 J. J. Marsh. 159.

debt of such one. The officer in levying takes possession of the whole, and delivers the whole to the purchaser,¹ for each one of such common owners may take possession of the whole, as their interests can not be separated; and so may the officer, who represents, in that respect, the execution debtor. The interest of the debtor, however, alone passes to the purchaser, and not the whole interest in the entire property.² The execution purchaser holds the other interests for his co-owners. If, after levy of such common interest, and before sale, the execution debtor buy one or more of the other interests in the property, the officer, without further notice, may sell the entire interest of the debtor, including the rights so acquired by his purchase.

§ 1226. In New York, and several, if not most of the States, the sheriff may levy and sell the *interest* of one partner in goods of a co-partnership, upon a judgment and execution against one only of the firm, recovered against him, for his own individual debt. And if an attachment of the firm goods of a co-partnership be made as against non-residents, and afterwards be vacated as to one or more of the partners who are residents, such attachment is not in itself an appropriation of all the goods so originally attached, to the payment of the attachment debt. Under execution emanating from such proceedings, the officer can sell the interest only of the non-resident partners as to whom the writ of attachment and levy were kept alive.³

§ 1227. So in Texas, the interest of one partner, in copartnership goods, may not only be so sold on execution against him,⁴ but a court of equity will ascertain, and subject the interest, if need be, in aid of the writ of execution, and no arrangement

¹ *Birdseye v. Ray*, 4 Hill, 158; *Hayden v. Binney*, 7 Gray, 416; *Neary v. Cahill*, 20 Ill. 214; *White v. Jones*, 38 Id. 159; *James v. Stratton*, 32 Id. 202.

² *Neary v. Cahill*, *supra*.

³ *Berry v. Kelly*, 4 Robert. 106. And so in Pennsylvania. *Vandyke v. Boskam*, 67 Penn. St. 330. And in New Hampshire and in Texas. *True v. Congdon*, 44 N. H. 48; *DeForest v. Miller*, 42 Tex. 34; *Story on Partnership*, Secs. 261, 263, and 311; *Douglass v. Winslow*, 20 Maine, 92; *Moody v. Payne*, 2 Johns. Ch. 532. And such is the rule in England. *Chapman v. Koops*, 3 Bos. & Pul. 288. This is also the rule in Illinois. *White v. Jones*, 38 Ill. 160.

⁴ *DeForest v. Miller*, 42 Tex. 34. In the case here cited, the court dissent from so much of the ruling previously established in *Warren v. Wallis*, 38 Tex. 228, as holds that the undivided interest of a partner in partnership goods can only be reached and subjected to sale in equity, and cite *Story on Partnership*, 3 Ed. 404; 3 Kent, 77, 78; *Rogers v. Nichols*, 20 Tex. 725; *Thompson v. Tinnin*, 25 (supplement) Tex. 56.

between the copartners, after levy, varying the ownership, will be of any avail as against the levy.¹

§ 1228. By thus selling the *mere interest* of a copartner, the purchaser takes only such right or interest as the debtor himself had in the property, and enforceable only as the debtor could have enforced it, subject, of course, to priority of liability for copartnership debts, if required by deficiency of other assets to meet the same.²

§ 1229. A merely equitable interest in personal property, unaccompanied with possession, can not be levied and sold at common law; and such, too, is the rule in Missouri.³ It can neither be handled nor seen, and is incapable of delivery. If subject to sale, it is only so by statute. But before forfeiture, the interest of a mortgageor in mortgaged personal property may be levied and sold if he still retains possession of the property. The purchaser takes subject to, and may redeem the mortgage.⁴

§ 1230. In levying and selling shares of stock, where liable by statute, it is the shares, or interests, and not the certificates, that are acted on and sold, and a description by the numbers of the several shares, and by the owner's name, is sufficient.⁵

Manuscripts secured by copyright, or which are the subjects of copyright, are liable to levy and sale on execution against the owner.⁶ But the officer levying can neither legally use them, nor make, sell, or publish copies of them. If he does either, he is liable to an action for so doing.⁷

In Iowa, it is held that the right of redemption in land from a trust deed is the subject of judgment lien, and that after sale by the trustee, the surplus fund, if any, represents the subject of the judgment lien, and that the lien of the judgment is subrogated to this surplus fund, and may be enforced in equity against the same in the hands of such trustee, or may be levied and

¹ Thompson *v.* Tinnin, 25 (supplement) Tex. 56.

² Truc *v.* Congdon, 44 N. H. 48.

³ Yeldell *v.* Stemmons, 15 Mo. 443; Sexton *v.* Monks, 16 Id. 156; Boyce *v.* Smith, Id. 317.

⁴ Cotton *v.* Marsh, 3 Wis. 221; Merritt *v.* Niles, 25 Ill. 282; Schrader *v.* Woeflin, 21 Ind. 238; Durfee *v.* Grinnell, 69 Ill. 372.

⁵ Stamford Bank *v.* Ferris, 17 Conn. 259.

⁶ Banker *v.* Caldwell, 8 Minn. 94.

⁷ Ibid.

seized on execution, and process of garnishee.¹ But a judgment is not liable, in Iowa, to execution levy and sale.²

§ 1231. Iron safes and planing mills, when not attached to the realty in such manner "as to indicate that it is designed to be permanent," are regarded as personal property subject to execution;³ and though owned and used by a railroad company, have been held not to be exempt from execution as property appurtenant to the franchise, or as connected with the freehold; so, likewise, fuel, office furniture, stationery, material for lights, and other detached property of the corporate company, are regarded in Illinois as subject to execution in proceedings against the company.⁴

§ 1232. Though there be some decisions to the contrary, the better opinion is that, at common law, money in the possession of the debtor is subject to *levy* upon execution.⁵ But not money in the hands of the officer, as sheriff, for instance, realized upon execution in favor of one against whom also there is an execution. This is no more subject to levy than is a debt due from some other person to the defendant. The plaintiff in execution has no claim to the specific pieces of money received by the sheriff, but only to the amount. If the sheriff is in default of paying over, detinue will not lie for the particular dollar previously received by him, but rather debt for the particular amount. Therefore, there is not such an ownership of the plaintiff in the money collected by the sheriff on one writ, as will subject it to levy on another writ before the same is paid over.⁶

¹ Cook *v.* Dillon, 9 Iowa, 407, 412.

² Osborn *v.* Cloud, 23 Iowa, 104. It can only be reached by garnishee against the judgment debtor.

³ Titus *v.* Mabee, 25 Ill. 257, 260.

⁴ Hunt *v.* Bullock, 23 Ill. 320; Palmer *v.* Forbes, Id. 302. So also the mortgageor's interest in chattels before default, Durfee *v.* Grinnell, 69 Ill. 372. The interest of a vendor in lands sold, default being made in the payment, may likewise be sold upon execution, McLaurie *v.* Barnes, 72 Ill. 73.

⁵ Armstead *v.* Philpot, 1 Doug. 231; Dalton's Sheriff, 145; Turner *v.* Fendall, 1 Cranch, 117; Crocker on Sheriff's, Sec. 451; The King *v.* Webb, 2 Shower, 161; Noble *v.* Kelly, 40 N. Y. (1 Hand,) 415; Russell *v.* Lawton, 14 Wis. 202.

⁶ Benson *v.* Flower, 3 Croke, 166, 176; Turner *v.* Fendall, 1 Cranch, 117; Baker *v.* Kenworthy, 41 N. Y. (2 Hand,) 215; Carroll *v.* Cone, 40 Barb. 220. In Baker *v.* Kenworthy, supra, the Court of Appeals of New York assumed it to be a principle nearly uniform in the other States as well as in New York, and in the courts of the United States, that "money so collected is not the

When paid over to the plaintiff, and not before, he will have such a property in the particular pieces, and they may then be levied on upon an execution against him,¹ if the officer can obtain possession of the same without violating the person of the owner, or using other unlawful means. Like other personal property, it is then subject to levy, and is to be reached as other personal property is to be reached by the officer. It is the duty of the officer to bring the money, with his return upon the writ, into court, as the writ demands. The court may then order its application on the writ against the plaintiff, if no reason be shown to the contrary, as was done in the case of *Armstead v. Philpot*, supra. For the money, when thus returned into court, is in the custody of the law, and may, by order of the court, be applied to the execution in the hands of the officer, if no other equity or claim thereto is shown; but not against a *bona fide* assignee thereof.²

§ 1233. Leasehold estates for years are *chattels real*, and are to be sold on execution, under the statute, in Michigan, as personal property is required to be sold.³ A sale there of such interests, made as realty, if sold on execution, is void.⁴ The term real estate does not include chattels real. In cases of sales of short terms, the lease itself may expire, and thus the estate terminate before the expiration of the time of redemption, and thus defeat the sale.⁵

§ 1234. But money paid to the proper officer, under the law, for the redemption of land sold upon execution, is, while in his hands, in the custody of the law, and is, therefore, not subject to levy and application on execution against the party placing it there, although the execution purchaser deny the right to redeem, and, therefore, refuse to receive the money. The denial of the right to redeem being the basis of the refusal, the money remains in legal custody till the question of such right is adjudicated; and the refusal to receive it is only a qualified refusal to that

subject of levy against the party upon whose execution it was collected;" p. 218. *State v. Taylor*, 56 Mo. 492.

¹ *Turner v. Fendall*, 1 Cranch, 117; *Dalton's Sheriff*, 145; *The King v. Webb, 2 Shower*, 166.

² *Baker v. Kenworthy*, 41 N. Y. 215; *State v. Taylor*, 56 Mo. 492.

³ *Buhl v. Kenyon*, 11 Mich. 249.

⁴ *Ibid.*

⁵ *Ibid.*

extent, and does not affect the character of the sheriff's custody of the fund. The officer does not, in such case, represent the parties, or either of them, but acts in his official capacity as an officer of the law and in discharge of a duty imposed on him by law.¹

§ 1235. A watch worn upon the person is not exempt from execution under a statute exempting "all wearing apparel of the debtor and his family." But, of course, it can not be taken from the person. The words of the statute are to be construed according to the common and popular usage of the language, and will in such sense be understood as referring to garments or clothing generally designed for wear.²

Nor is it exempt as household furniture. Articles within that description are not worn upon the person.³ Nor under the description of tools and instruments of any mechanic or other person kept and used for carrying on his trade, though the debtor be a cigar-maker and use the watch as noting the hours of employment. It is in nowise essential to that more than to other avocations, and is not in the sense of the law a tool or instrument kept or used for carrying on one's trade or business.⁴

§ 1236. The half-pay of an officer of the United States is not liable to the debts due from the officer, and can not be reached for that purpose by any process of attachment, garnishee, sequestration, or levy and sale whatever. Intended as it is as a means of subsistence, it can not be divested or intercepted by judicial process.⁵

§ 1237. The purchase of and partial payment for personal property, with the understanding that the property is to remain in the vendor, and who retains possession thereof until fully paid for, does not vest such ownership and property in the vendee as is subject to be levied and sold on a writ of execution against him.⁶ Nor can the officer or execution creditor assume to pay the residue of the purchase money, and thereby render the property liable to the execution.⁷

¹ Davis *v.* Seymour, 16 Minn. 210.

² Rothschild *v.* Boelter, 18 Minn. 361.

³ Ibid.

⁴ Ibid.

⁵ Elwyn's Appeal, 67 Penn. St. 367.

⁶ Sage *v.* Sleutz, 23 Ohio St. 1.

⁷ Ibid.

§ 1238. Attaching creditors by levy upon personal property, which is subject to a superior mortgage in point of date, obtain such liens on the property by the levy as entitles them to redeem from the mortgage lien;¹ and to perfect this right of redemption from the prior mortgage lien, suit lies in behalf of the plaintiff in the writ of execution.²

And being entitled to maintain such suit as a plaintiff, therefore if the property so levied and held by the officer be replevied out of the officer's possession by the mortgagee, in an action of replevin, then the execution creditor may cause himself to be made a defendant to the suit, and by a proceeding in the nature of a cross action or counter claim enforce his right of redemption.³

§ 1239. In Rhode Island, goods subject to a mortgage may be levied and sold on execution while yet in the possession of the mortgageor, subject to redemption from the mortgage; but, of course, only the right of redemption and ownership subject to redemption passes to the purchaser.⁴ Formerly the redemption contemplated was that given by statute, the right of making which was limited therein to sixty days after breach or forfeiture of the mortgage by non-payment of the mortgage debt when due, and was not what is known as the equitable right to redeem.⁵ But by the statute, as subsequently amended, the levy may be made at any time during the period that it is yet redeemable, either under the statute or in equity, from the mortgage lien, so that the right to seize the same on writs of attachment or of execution is not now limited to sixty days after forfeiture or breach of the mortgage, but may be done at any time while the property is still in the possession of the mortgageor.⁶

§ 1240. It is well settled, in Pennsylvania, that engines and machinery of every kind, erected by a tenant or lessee to carry on his business in which he is engaged, is personal property during his term of lease, and if not as such exempt by statute, may be levied and sold as personal property for the lessee's debts on executions at law, and that the purchaser at execution sale

¹ Morgan *v.* Spangler, 20 Ohio St. 38.

² Ibid.

³ Ibid.

⁴ Anthony *v.* Shaw, 7 R. I. 275.

⁵ Earle *v.* Anthony, 1 R. I. 307.

⁶ Anthony *v.* Shaw, *supra*.

may remove them any time before the expiration of the term of the tenancy.¹

2.—THE LEVY.

IV. WHEN TO BE MADE.

§ 1241. Unless made at a time prohibited by law, a levy will doubtless be valid at any time within the life of the execution.

Though ordinarily it should be made, when practicable, within reasonable hours and not at dead of night, to the annoyance of the debtor, yet there are emergencies which justify the making of it whenever practicable.² But it must be made during the lifetime of defendant³ and of the writ.⁴

§ 1242. Returnable to next term means the first day of such term. A levy made after the judicial end of that day, and sale thereon, are unwarrantable as on a levy made too late.⁵

For such illegal levy and sale,⁶ or even for the levy alone trespass lies against the officer.⁷

If sale be made, however, and the proceeds applied to the debt, such fact goes in evidence in diminution of damages.⁸

V. HOW TO BE MADE.

§ 1243. "A mere paper levy" is void.⁹ The officer should take actual possession;¹⁰ but removal of the goods is not abso-

¹ *Heffner v. Lewis*, 73 Penn. St. 302; *Lemar v. Miles*, 4 Watts, 330; *White's Appeal*, 10 Penn. St. 252. And the same rule applies to underground fixtures and rails in a mine made to facilitate the operations of mining. *Ibid.*

² 3 Bac. Abt. "Execution," 734; *State v. Thackham*, 1 Bay, 358.

³ *Arnold v. Fuller*, 1 Ohio, 214, 219; *Cartney v. Reed*, 5 Ohio, 221.

⁴ *Devoe v. Elliott*, 2 Caines' R. 243; *Vail v. Lewis*, 4 Johns. 450; *Gaines v. Clark*, 1 Bibb, 608.

⁵ *Prescott v. Wright*, 6 Mass. 20, 23.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Carey v. Bright*, 58 Penn. St. 70, 84. In this case the court say: "A mere paper levy is no levy at all, and a sale under it is a nullity. * * * A man might have his bed sold from under him by that means without his knowing it." *Duncan's Appeal*, 37 Penn. St. 500.

¹⁰ *Westervelt v. Pinckney*, 14 Wend. 123; *Levy v. Shockley*, 29 Geo. 710; *Banks v. Evans*, 10 S. & M. 35; *Brown v. Lane*, 19 Texas, 203; *Leach v. Pine*, 41 Ill. 66; *Beekman v. Lansing*, 3 Wend. 446; *Logsdon v. Spivey*, 54 Ill. 104; *Fluker v. Bullard*, 2 La. Ann. 338; *Grimes v. Merchants' Bank of Baltimore*, 4 La. Ann. 369; *Scott v. Niblett*, 6 La. Ann. 182.

lutely necessary;¹ yet there must be actual control and view of the property, with power of removal.²

§ 1244. The property may then be placed in the care of a third party;³ but at the risk of the officer.⁴ Such control must be exercised as if done without the writ, would amount to trespass.⁵

§ 1245. Therefore, the officer levying on personal property, should be careful to ascertain it to be the property of the defendant in execution; for inasmuch, as ordinarily, a levy upon personal effects, must, as we have seen, in order to make it effectual, be accompanied by such seizure, and acts of exclusive control, as will amount to a trespass if illegal, and as the seizure of the property of one person for the debt of another is unauthorized by the law, the officer may, for want of proper care in that respect, subject himself to an action. The writ of execution is no protection for levying on the property of one person for

¹ Very *v.* Watkins, 23 How. 469, 474; Bullitt *v.* Winston, 1 Munf. 269; Moss *v.* Moore, 3 Hill, (S. C.) 276; Pugh *v.* Calloway, 10 Ohio St. 488; Logsdon *v.* Spivey, 54 Ill. 104.

² Ray *v.* Harcourt, 19 Wend. 495; Haggerty *v.* Wilber, 16 Johns. 287; Van Wyck *v.* Pine, 2 Hill, 666; Duncan's Appeal, 37 Penn. St. 500; Cawthorn *v.* McCraw, 9 Ala. 519; Minturn *v.* Stryker, 1 Edm. Sel. Cas. 356; Carey *v.* Bright, 58 Penn. St. 70; Logsdon *v.* Spivey, 54 Ill. 104. In Carey *v.* Bright the court hold the following language as to the levy: "In this case the question was only whether, as to part of the goods alleged to have been sold, there ever had been a legal levy. A mere paper levy is no levy at all, and a sale under it is a nullity as to subsequent execution creditors and purchasers. Lowry *v.* Coulter, 9 Barr, 349. A man might have his bed sold from under him by that means without his knowing it. There was here a considerable amount of personal property levied on, but the sheriff added to the inventory 'all other personal property in, about, and connected with said colliery,' and without having ever gone down into the mines or seen the property, he sold under that description, and left the whole in the possession of the defendants in the execution, from whom the landlord afterwards purchased it."

³ Very *v.* Watkins, 23 How. 469, 474; Bullitt *v.* Winston, 1 Munf. 269.

⁴ Logsdon *v.* Spivey, 54 Ill. 104; Bullitt *v.* Winston, supra; Cliver *v.* Applegate, 2 South. 479; Moss *v.* Moore, 3 Hill, (S. C.) 276; Smith *v.* Hughes, 24 Ill. 270.

⁵ Westervelt *v.* Pinckney, 14 Wend. 123; Havely *v.* Lowry, 30 Ill. 446; Davidson *v.* Waldron, 31 Ill. 120; McBurnie *v.* Overstreet, 8 B. Mon. 303; Carey *v.* Bright, 58 Penn. St. 70; Allen *v.* McCalla, 25 Iowa, 464; Minor *v.* Herriford, 25 Ill. 344; Roth *v.* Wells, 29 N. Y. 471; Duncan's Appeal, 37 Penn. St. 500. (And so possession of the whole may be taken by the officer, levying on the interest in personal effects, of one of two tenants, in common. Blevins *v.* Baker, 11 Ired. 291.)

the debt of another.¹ Such, too, is the law, as well in regard to the property or interest of lien-holders, as to absolute owners of the property levied upon, if the lien has become absolute, as, for instance, in the case of a mortgagee, the condition of whose mortgage has become forfeited, the title to the property is then in the mortgagee, subject only to an equitable right in the debtor to redeem, and therefore a levy and seizure of property after such forfeiture is a wrong against the mortgagee for which an action will lie.² The nature of the action it is not our purpose here to discuss.

§ 1246. If, however, there be no breach of a condition by which the mortgage is forfeited, then the mortgageor is the legal owner, and the property may be levied and seized subject to the mortgage lien,³ the purchaser thereof at execution sale may then, upon general principles, discharge the mortgage lien by payment thereof, so as to vest the ownership of the property unconditionally in himself.

§ 1247. And so of the levy and sale as the *sole* property of one person, of a chattel which belongs to him and another. The sale being of the *entirety*, is a conversion of the *whole*, and is therefore illegal as to both the owners, so that they may have an action against the officer.⁴

§ 1248. To effect a levy, the officer must have access to and power over the goods and chattels levied, but to obtain this he may not break open the outer door of any building in which they are contained.⁵

Real fixtures, such as steam machinery set up and affixed to the premises, in Delaware, are held to belong to the realty, and may not be levied and separated by the officer as personal property, nor be sold separate from the land. They are of the realty, and the land-owner himself can not convey them except as in the manner required for conveying the realty.⁶ And so are the

¹ *Pike v. Colvin*, 67 Ill. 227; *The State v. Conover*, 4 Dutch. 224; *Farrel v. Colwell*, 1 Vroom, 123.

² *Pike v. Colvin*, 67 Ill. 227; *Merritt v. Niles*, 25 Ill. 282; *Prior v. White*, 12 Ill. 261.

³ *Pike v. Colvin*, *supra*.

⁴ *Farrel v. Colwell*, 1 Vroom, 123.

⁵ *Boggs v. Vandyke*, 3 Harr. (Del.) 288.

⁶ *Rice v. Adams*, 4 Harr. (Del.) 332. (Not so, however, if set up by a mere tenant for his own use. *Ibid.*)

fruits upon fruit trees a part of the realty, and not subject to levy or sale separately from the lands; but if gathered, it is otherwise, for liability to levy and sale then attaches, for by such severance they become personal property.¹

§ 1249. If the execution defendant be dead, a levy may be made upon the goods and chattels in the possession of the administrator, provided the writ bears date anterior to the defendant's death, although not issued in fact until after his death. For by the common law writs of execution have relation to the term, which is but as one day, and, therefore, bind the goods and chattels from that date; and these principles still govern in Delaware.²

The stay of proceedings on the writ, if without fraudulent purpose, will not invalidate a levy when legally made.³

§ 1250. And though, as in Delaware, the statute require that the goods and chattels be exhausted first before levying execution on the lands of an execution defendant, yet by consent of the defendant the lands may be first taken, and this, too, although objected to by other judgment creditors.⁴

Such exemption of the lands until the personality is disposed of, is for the benefit of the debtor as a personal privilege, which he may waive if he will, it being generally supposed to be more conducive to the family of the debtor to spare their personal effects.⁵ The interposition of the other judgment creditor in the case here cited was by an objection to the sale of the land being confirmed, confirmation of execution sales being the practice in Delaware; but the court overruled the objection and confirmed the sale.

§ 1251. A description of the goods and the facts constituting the levy should be indorsed on the writ, under signature of the officer.⁶ A reasonable time therefor, and for removal, if the goods which are to be removed, is allowed by law.⁷

§ 1252. A levy from the outside of a locked up house, of goods within, is invalid, although one or more articles found

¹ State *v.* Gemmill, 1 Houston, 9.

² Graham's Exrs. *v.* Wilson, 5 Harr. (Del.) 435; Taylor *v.* Horsey, Id. 131.

³ State *v.* Records, 5 Harr. (Del.) 146.

⁴ Springer's Admr. *v.* Johnson, 3 Harr. (Del.) 515.

⁵ Ibid.

⁶ Haggerty *v.* Wilber, 16 Johns. 287; Davidson *v.* Waldron, 31 Ill. 120.

⁷ Wood *v.* Van Arsdale, 3 Rawle, 401.

outside are actually seized. It is only valid as to the articles seized.¹

§ 1253. Though the officer can not release the levy² and take other property, yet he may levy on other if the defendant, by any means, prevent the sale of the property first levied on.³ So, to render an additional levy valid, it must appear that the first had become in some manner unavailable.⁴

§ 1254. A levy and sale of a certain number of bricks in a kiln, will be valid if it is in the power of the officer to deliver the same; and the buyer may, by direction of the officer, open the kiln and take them away;⁵ but not by selecting the same, only in the usual manner.

§ 1255. If from any circumstance actual possession can not be taken, and a levy on mere view is relied on, then the officer should call indifferent persons to witness his open assertion of the levy.⁶

§ 1256. The writ first received must be first levied. A postponement of the first, if by plaintiff's order, gives right to priority of levy to the second.⁷

§ 1257. If both are received at once, then they should be levied together, and of the proceeds of sale take share and share alike until either be satisfied; then the balance, until satisfaction, goes to the other writ.⁸

§ 1258. In Tennessee, if the writ of *fieri facias* bears teste anterior to the death of the judgment debtor, his death does not affect the validity of the writ as against the personal effects, and a levy and sale of personal property may be made thereon.⁹

It is the duty of the officer levying on personal effects to take

¹ Haggerty v. Wilber, 16 Johns. 287.

² Smith v. Hughes, 24 Ill. 270.

³ Ibid.

⁴ Ibid.

⁵ Hill v. Harris, 10 B. Mon. 120.

⁶ Moore v. Fitz, 15 Ind. 43.

⁷ Deposit Bank of Cynthiana v. Berry, 2 Bush, 236; Bragg v. The State, 30 Ind. 427. If the officer do otherwise, make the money and pay it over to plaintiff in a subsequent writ, he is liable therefor to plaintiff in the writ first received, unless postponed by his order. Ibid.

⁸ Campbell v. Ruger, 1 Cow. 215.

⁹ Preston v. Surgoine, Peck, 72; Black v. The Planters' Bank, 4 Humph. 368; Battle v. Bering, 7 Yer. 531; Johnson v. Ball, 1 Yer. 292; Daley v. Perry, 9 Yer. 443; Neil v. Gaut, 1 Cold. 396.

and keep possession of the property until payment or sale, and if after sale the purchaser refuse to comply with his bid, the officer is to resell at his risk as to price.¹ If on resale it brings less than before, the officer should sue for the difference, but for not doing so will not be held liable to either party. He is not their agent. Such is the ruling in Tennessee.²

§ 1259. If the officer has properly levied and taken possession of the property, then it is his duty to go on and sell, although the writ expire, or even be lost or destroyed, for he being legally invested with the title by the levy for a special purpose, he must divest himself thereof by sale. He needs no *venditioni exponas* if the writ runs out or is lost, for the *venditioni* only commands him, if issued, to do that which in law it is his duty to do anyhow.³

VI. ITS EFFECT

§ 1260. A proper levy to an amount sufficient to satisfy the writ satisfies the judgment *sub modo*.⁴ Unlike a levy on the realty, it vests in the officer levying a special property in the thing taken.

This doctrine that the levy of personality, or chattels, vests a special property in the articles levied on, in the sheriff or officer making the levy, runs current through all the earlier law books, not only as the English but also as the American rule.

It was so held in New Jersey, as early as 1795. And though the levy was of lands, yet the Supreme Court of that State held that lands levied on execution for debt, were "to every intent chattels," and that chattels seized on execution, were vested in the officer, and could be sold by his executor or administrator in case of his death before sale.⁵

¹ McClure *v.* Williams, 5 Sneed, 718; Roberts *v.* Westbrook, 1 Cold. 115.

² Roberts *v.* Westbrook, *supra*.

³ Willoughby *v.* Dwey, 63 Ill. 246; Phillips *v.* Dana, 4 Ill. 551; Prescott *v.* Wright, 6 Mass. 20.

⁴ Ford *v.* Skinner, 4 Ohio, 378; Corning *v.* Burdick, 4 McLean, 133; Smith *v.* Hughes, 24 Ill. 270; Trenary *v.* Cheever, 48 Ill. 28; Cass *v.* Adams, 3 Ohio, 223; Green *v.* Burke, 23 Wend. 490; Parker *v.* Dean, 45 Miss. 408; Wade *v.* Watt, 41 Miss. 248; Alexander *v.* Polk, 39 Miss. 737; Lindley *v.* Kelley, 42 Ind. 294; Frank *v.* Braskett, 44 Ind. 92; Bennett *v.* McGrade, 15 Minn. 132; U. S. *v.* Dashiel, 3 Wall. 688.

⁵ Read *v.* Stevens, 1 Coxe, 264; Mildmay *v.* Smith, 2 Saund. 338, 343; Clerk *v.* Withers, 6 Mod. 298; Doe *v.* McKinnie, 4 Hawks, 279. And by the latter

This ruling as to lands being, when levied, mere chattels, was by analogy to the rule that only personal property had at common law, been subject to levy, and therefore when lands were so subjected by statute to levy and sale, instead of being subjected to debt by *elegit*, they were treated, as regards the effect in law, of levying and selling and in reference to the manner of sale, as personal property was treated under similar circumstances.¹

Now, although the idea no longer exists in law, that lands levied for sale, are personality or chattels, yet the rule still holds good, in most of the States, that the levy of chattels vests a special property in the officer; but by subsequent enactments and usage, the making of sale after levy, devolves upon the official successor of the sheriff, in case of the death of that officer after levy and before sale, or else upon the coroner. In New Jersey, however, there are subsequent rulings to the effect, that an attachment or execution levy merely places the goods levied in the custody of the law, and does not vest a special property in the officer, and that, therefore, if disturbed in their possession, he can not maintain an action therefor.²

§ 1261. In New Jersey the writ of execution is a lien on property from the time of its delivery to the officer, but subject to the rights of *bona fide* intervening purchasers before levy.³

§ 1262. There is an exception, however, as to stocks in corporate companies. Under the New Jersey statute, the levy is made by the officer going to the proper officer of the corporation, and demanding, and he is entitled to have, a certificate of such shares as are owned by the execution debtor, and by levying the same on receipt of the certificate, and notifying the officer at the same time that they are levied upon; and also notifying the defendant of such levy. This certificate and levy places the stock in legal custody, and it may then be sold by the officer.⁴

case the officer might sell after the return day of the writ if the levy is of personality, but if of realty, he must have had a new writ in case the first one had expired; *Smith v. Spencer*, 3 Ired. L. 256.

¹ *Clerk v. Withers*, 6 Mod. 298; *Cooper v. Chitty*, 1 Burr. 34; *Mildmay v. Smith*, 2 Saund. 343.

² *Austin v. Wade*, 2 Penn. (N. J.) 551; *Tuttle v. Jackson*, 1 Southard, 115.

³ *Newell v. Sibley*, 1 Southard, 381; *Northampton, Town of v. Woodward*, 2 Southard, 788; *James v. Burnett*, 20 N. J. L. 135.

⁴ *Princeton Bank v. Crozer*, 22 N. J. L. 383.

§ 1263. In questions of priority as to application of proceeds of sales, where the officer holds several writs, the court from which the oldest writ issued has the jurisdiction to apply the proceeds.¹

§ 1264. Though the levy of an execution upon sufficient personal property to satisfy the writ, is regarded in law, as a satisfaction of the debt, yet it is only so, upon the presumption that the debtor is permanently deprived of the property, upon due course of execution, and therefore should be exonerated from further liability, leaving the creditor to look to the officer.² But this presumption may be overcome by showing to the contrary;³ for if, without fault of the officer or plaintiff, the levy becomes unavailing, then it is not a satisfaction of the judgment.⁴

§ 1265. The first levy of personality vests a special property in the officer,⁵ which will be respected and maintained even in a different jurisdiction, as against the execution debtor, or a wrong-doer.⁶

In such case, the expenses of regaining the property will be reimbursed to the officer, with reasonable compensation for his services.⁷

§ 1266. Though a levy on personal property is satisfaction *sub modo*, if of a sufficiency in value to pay the writ and costs,⁸

¹ Heinself *v.* Smith, 34 N. J. L. 215.

² First National Bank of Hastings *v.* Rogers, 15 Minn. 381; Bennett *v.* McGrade, 15 Minn. 132; Frank *v.* Braskett, 44 Ind. 92; Lindley *v.* Kelley, 42 Ind. 294. And, in Indiana, it is the same whether the property levied on be real or personal; Ibid. U. S. *v.* Dashiell, 3 Wall. 688.

³ First National Bank of Hastings *v.* Rogers, 15 Minn. 381; Green *v.* Burke, 23 Wend. 490; Peck *v.* Tiffany, 2 N. Y. 456; Bennett *v.* McGrade, 15 Minn. 132; Frank *v.* Braskett, 44 Ind. 92; Lindley *v.* Kelley, 42 Ind. 294; U. S. *v.* Dashiell, 3 Wall. 688.

⁴ Curtis *v.* Root, 28 Ill. 367, 377; Smith *v.* Hughes, 24 Ill. 270; Green *v.* Burke, 23 Wend. 490; Parker *v.* Dean, 45 Miss. 408; Wade *v.* Watt, 41 Miss. 248; Alexander *v.* Polk, 39 Miss. 737.

⁵ McClintonck *v.* Graham, 3 McCord, L. 553; Rhoads *v.* Woods, 41 Barb. 471; Williams *v.* Herndon, 12 B. Mon. 484; Christian *v.* O'Neal, 46 Miss. 669; Bradley *v.* Kesee, 5 Cold. 223; Etheridge *v.* Edwards, 1 Swan, 426; Brown *v.* Allen, 3 Head, 429.

⁶ Rhoads *v.* Woods, 41 Barb. 471. If there be one writ from a United States court, and another from a State court, the one first received should be first levied, and the first levy places the goods in *custidio legis*, and will have precedence. Shaller *v.* Wickersham, 7 Cold. 376.

⁷ Rhoads *v.* Woods, 41 Barb. 271.

⁸ Morton *v.* Smith, 2 Dillon, 316; Lynch *v.* Pressley, 8 Geo. 327.

yet such is not the rule, at least to the same extent, in cases of levy on real property. In the one case, the property is taken into the officer's possession and a special ownership is vested in him, but in the other it is only the title that is seized, and it can only be passed by a valid sale and conveyance under the writ; it never vests in the officer, but passes directly to the purchaser.

Therefore it is, and is so held, that a levy and sale of real estate on execution is valid, if otherwise sufficient, although other lands may have been previously levied on a prior execution issued on the same judgment, but which were not sold for want of bidders.¹

§ 1267. The ruling, in Virginia, is, that the levy of a *fieri facias* upon personal property vests only a special property in the officer, and that, too, only for the purposes of the writ. Hence, if all parties in interest agree to abandon the levy, it may be abandoned and a new writ may issue.² In such case, we esteem it to be a question of fact as to the abandonment, to be ascertained by the court, and think there should be a judicial order for issuing the new writ. The officer's return of the agreement to abandon is not evidence thereof, and the clerk should not issue the new writ without an order of the court in that particular.³

§ 1268. But if the property levied on be lost by the neglect or misconduct or fault of the officer, then the levy will be treated as satisfaction of the writ to the value of the property thus levied on and lost, and the officer and his sureties are responsible to the execution creditor for the amount.⁴

¹ *Morton v. Smith*, 2 Dillon, 316.

² *Walker v. The Commonwealth*, 18 Gratt. 13.

³ *Shannon v. McMullin*, 25 Gratt. 211; *Shackelford v. Apperson*, 6 Id. 451.

⁴ *Walker v. McMullin*, supra; *Crocker on Sheriffs*, 2d Ed. Secs. 448 and 855. The exercise of ordinary diligence and care on the part of the sheriff is required of him. In the absence of negligence on the part of himself or deputies, the current of authority is to the effect that he will not be liable. *Browning v. Hanford*, 5 Hill, 588; *Dorman v. Kane*, 5 Allen, 38. So, also, if the officer in whose hands an execution is placed shall, without the consent of the creditor, so delay making a proper levy that the rights of third parties intervene, the creditor has his remedy against the officer. *Davidson v. Waldron*, 31 Ill. 120.

VII. WHEN VOID, OR DISCHARGED.

§ 1269. A levy made after return day, is void.¹ So, if made after death of the debtor.² So, also, if the property be not subject to the writ, as if held under a valid trust for the payment of other debts of the execution debtor.³

§ 1270. A levy may be lost by unreasonable delay to sell,⁴ and when so discharged by delay its seniority can not be reinstated.⁵

§ 1271. The levy of a writ on property of a greatly excessive value will be held void. Thus the levy of a writ of execution calling for one hundred and nine dollars on personal property worth thirty or forty thousand dollars, was held grossly excessive and void; and if the property be seized and detained by the officer, replevin will lie for its recovery and for damages for the detention thereof.⁶

VIII. WHEN IT WILL BE SET ASIDE

§ 1272. A levy can only be removed by sale, or by an order of court, unless agreed to be displaced by the parties to the writ.⁷ It will not be discharged by a release of the property made through mistake.⁸ It will be set aside, if personal property be levied on, without leave to the debtor to turn out realty, where he has a right so to do.⁹ It will also be set aside if levied on property which is in the hands of a receiver under judicial authority,¹⁰ or while in the possession of an officer of the law or other legal custody.

¹ *McElwee v. Sutton*, 2 Bush, 361; *Savings Institution v. Chinn*, 7 Bush, 539; *Crocker on Sheriffs*, 2d Ed. Sec. 419; *Haggerty v. Wilber*, 16 Johns. 287; *Wack v. Stevenson*, 54 Mo. 481; *Bank of Missouri v. Bray*, 37 Mo. 194.

² *Arnold v. Fuller*, 1 Ohio, 214.

³ *Thompson v. Ford*, 7 Ired. 418; *Buckingham v. Granville Alex. Society*, 1 Ohio, 458; *Lessee of Cartney v. Reed*, 5 Ohio, 221.

⁴ *Deposit Bank v. Berry*, 2 Bush, 236.

⁵ *Weber v. Henry*, 16 Mich. 399, 403.

⁶ *Silver v. McNeil*, 52 Mo. 518.

⁷ *Smith v. Hughes*, 24 Ill. 270.

⁸ *Walker v. The Commonwealth*, 18 Gratt. 18.

⁹ *Pitts v. Magie*, 24 Ill. 610.

¹⁰ *Robinson v. Atlantic & Great Western R. R. Co.*, 66 Penn. St. 160.

IX. CONSTRUCTIVE LEVY.

§ 1273. Where a sheriff holds several executions in favor of different persons, but against the same judgment debtor, one of which being levied, the others come to his hands afterward between the day of such levy and the day of sale, it is not necessary, so far as respects the property levied upon by the first writ, or the surplus proceeds of sale thereof, to make a formal levy of the subsequent writ or writs. The levy on the first writ is valid in law as to all the writs subsequently received, so as to entitle them, each in their order, if more than one, to participate in and receive the surplus, if any, of the moneys raised by the sale.¹

X. THE SALE—BY WHOM TO BE MADE.

§ 1274. The execution, though a judicial writ, commands the performance of a ministerial and not a judicial act.² All such writs, when directed to the sheriff generally, by his style of office, may be executed as well by any one of his legally constituted general deputies as by the high sheriff himself.³

The rule in this respect is believed to be the same, whether the levy and sale is of real or of personal property. Therefore, the reader is referred, for a fuller discussion of the subject, to Chapter XVI. of this work.

But we may add here, that neither the principal officer, nor his deputy, can execute the writ, or sell, when it is in favor of the officer as execution plaintiff, or when such officer has purchased or otherwise become interested in the proceeds thereof, except for his fees.⁴ Neither can the deputy, when in his favor or interest. In such cases the coroner must act.⁵

¹ Slade *v.* Van Vechten, 11 Paige, 21. In this case Chancellor WALWORTH lays down the rule as follows: "It is not material whether all the executions were levied or not, for if the sheriff had levied one execution and other executions were in his hands, or in the hands of his deputies, the levy would be valid as to all, so far as to entitle the others to the surplus, if any, raised at the sale under the execution upon which the levy was made, and the property advertised and sold."

² 8 Bac. Abt. 689, 690, 691; Wroe *v.* Harris, 2 Wash. (Va.) 126, 129.

³ Ibid.; Tillotson *v.* Cheetham, 2 Johns. 63; 8 Bac. Abt. 675, 676.

⁴ Chambers *v.* Thomas, 3 A. K. Marsh. 536, 537; Riner *v.* Stacy, 8 Humph. 288, 407; May *v.* Walters, 2 McCord, 470.

⁵ Singletary *v.* Carter, 1 Bailey, L. 467; Chambers *v.* Thomas, 1 Litt. 268, and Chambers *v.* Thomas, 3 A. K. Marsh. 536. In the case above cited of Chambers *v.*

§ 1275. If the writ is not otherwise satisfied, and property subject thereto be found and levied, then a sale becomes an act necessarily involved in the execution of the writ; and it follows that whoever may execute the writ may sell. Therefore, the principal sheriff, or any one of his legally constituted general deputies, may, in ordinary cases, sell.¹

§ 1276. But whether the sale be made by the one or the other of them, a crier, or auctioneer, may be employed to conduct the sale, provided his acts be done in the presence and under the direction of the officer.²

§ 1277. If, however, the writ be especially directed to the principal or high sheriff himself, by his personal name, as well as style of office, then he only, and no one else, can execute it.³

§ 1278. An execution in the hands of an officer when he goes out of office, which is partly executed by him, may be completely executed afterward. He continues sheriff for that purpose, and may carry out the work begun, either by himself or by his deputy, as if he were still in office.⁴

§ 1279. In the case of *Jackson v. Collins*, the court, SAVAGE, Justice, lay down the rule in these words: "He is in office *quoad hoc*, and the acts of a deputy in relation to such an execution are the acts of the sheriff himself."⁵ Such, too, is the doctrine even on a *ca. sa.* where the defendant is held in custody by the old sheriff. He may retain the custody of the defendant and complete the work of executing the writ.⁶

§ 1280. At common law, the officer was not bound to sell the goods at auction, but might sell at private sale, if he thought proper in the exercise of a wholesome discretion. If he sold at

Thomas, 1 Litt. 268, the Supreme Court of Kentucky say in reference to this subject: "The principal sheriff is never allowed to execute his own process, and so careful is the law in guarding the interest of the defendant in such cases that not even the deputy is permitted to execute the process; but it must go to the coroner, an officer not supposed to be under the influence of the sheriff." The identical point was previously adjudicated between the same parties and decided the same way in 3 A. K. Marsh. 537, by the Supreme Court of Kentucky.

¹ 8 Bac. Abt. 675; "Undersheriff," Ibid. 676.

² See *Ante*, Ch. XV., Subdivision 10.

³ 8 Bac. Abt. "Undersheriff," 676; *Wroe v. Harris*, 2 Wash. (Va.) 126, 129, 130.

⁴ *Jackson v. Collins*, 3 Cow. 89.

⁵ *Ibid.* 95.

⁶ *Hempstead v. Weed*, 20 Johns. 64; *Jackson v. Collins*, 3 Cow. 89, 95.

private sale, then he had no allowance for the expenses of sale. He was clothed with full discretion, as to time, place, and manner of sale, to enable him to carry out the command of the writ.¹

If either party required a sale at auction, it was made accordingly, but the expenses attending it were chargeable to the party so requiring it.² This broad discretion in selling, necessarily included the power to adjourn the sale, if it was being made at auction.

§ 1281. By statute in Rhode Island, the sale is required to be public and at auction, and upon public notice, describing the property to be sold, and the power of adjournment is still recognized, but, additional notice is required of one week, of the time and place of the adjourned sale.³

And a similar requirement as far as requiring the property to be sold at public sale, is uniform now in all the States.

XI. How to BE MADE.

§ 1282. The sale must be made at the time and place appointed by the notice given thereof, unless it be adjourned; and if made before the hour appointed it will be void in case the property goes for less than its full value;⁴ and also the sale is to be made during the business hours of the day. An execution sale, made out of business hours, as for instance, after sunset, is void, and the officer, by so making it, becomes a trespasser.⁵ If made before the day appointed, it is, in Illinois, held to be void.⁶

§ 1283. In selling personal property, the property to be sold must be present, so that it may be seen, handled and estimated, and ready for delivery.⁷

¹ Reynolds *v.* Hoxsie, 6 R. I. 463, 466; Woodgate *v.* Knatchbull, 2 Term. R. 148.

² Reynolds *v.* Hoxsie, *supra*; Woodgate *v.* Knatchbull, *supra*.

³ Reynolds *v.* Hoxsie, *supra*.

⁴ Williams *v.* Jones, 1 Bush, 621.

⁵ Carnrick *v.* Myers, 14 Barb. 9.

⁶ King *v.* Cushman, 41 Ill. 31.

⁷ Herod *v.* Bartley, 15 Ill. 58; Sheldon *v.* Soper, 14 Johns. 352; Cresson *v.* Stout, 17 Johns. 116; Ainsworth *v.* Greenlee, 3 Murph. 470; Blanton *v.* Morrow, 7 Ired. Eq. 47; Baker *v.* Casey, 19 Mich. 200. And the officer can not sell property which is not in immediate custody or control. Tibbetts *v.* Jagemann, 58 Ill. 48.

In the case of *Herod v. Bartley*,¹ Chief Justice TREAT, of the Illinois Supreme Court, lays down the law concerning this subject in the following terms: "In the sale of personal property on execution, the property itself must be present. Bidders should have an opportunity of inspecting the goods and forming an estimate of their value. This is the only way to secure fairness and competition at public sales. It is necessary to protect the rights of both debtor and creditor. It should also be in the power of the officer to deliver the property forthwith to the purchaser."

If a sale be made of personal property which is not present and capable of being inspected by the bidders, and of being delivered by the officer to the purchaser, the sale, in accordance with the doctrine held in the above case, will be void. Such, too, it is believed, is the weight of authority.

§ 1284. But although as a general principle, the officer selling personal property upon a writ of execution is required to have the same present at the place and time of sale, ready to be seen and examined by the bidders, and capable of being delivered to the purchaser, yet if a sale be made without such compliance by consent of the execution debtor, the plaintiff in execution, and all others interested therein, it will be valid; and more especially so, when the property sold is a growing crop, incapable of removal, or of delivery by any manual act.²

§ 1285. The sale must be at public auction, to the highest bidder, for the best price the property will bring,³ and must be for money; cash in hand.⁴ The officer may receive only gold and silver legal coin, or whatever else is by law a legal tender.⁵ The rule in this respect is the same as on sales of real estate on execution.⁶

§ 1286. "As a matter of discretion,"⁷ the officer may adjourn the sale to a different day, or place, or both; and if there be no

¹ 15 Ill. 58.

² Cook *v. Timmons*, 67 Ill. 203.

³ Bouvier's Inst., Sec. 3392, et seq.; Swortzell *v. Martin*, 16 Iowa, 519, 527.

⁴ Noy's Max. Ch. 42; Griffin *v. Thompson*, 2 How. 244; Sauer *v. Steinbauer*, 14 Wis. 70; Mumford *v. Armstrong*, 4 Cow. 553; Swope *v. Ardery*, 5 Ind. 213; Mitchell *v. Hackett*, 14 Cal. 661; Bigley *v. Risher*, 63 Penn. St. 152; Hilliard, Sales, 230.

⁵ Griffin *v. Thompson*, *supra*.

⁶ See *Ante*, Ch. XV., Subdivision 11.

⁷ Tinkom *v. Purdy*, 5 Johns. 345; Russell *v. Richards*, 11 Maine, 371.

fraud in it or abuse of discretion, the sale will be valid in that respect.¹

Nor will a postponement by the plaintiff's order destroy his priority in favor of subsequent writs, if done in good faith and from fair motives, and to a day not beyond the return day of the writ.² But otherwise, if to a day subsequent to the return day, it is void.³

§ 1287. A sale on execution has been held valid as between the debtor, creditor, and officer when made without notice, being so made by consent of parties.⁴

But the mere silence of the debtor, in standing by and seeing his property illegally sold on execution will not render such sale valid, and will not estop such debtor from testing the validity thereof.⁵

§ 1288. And the levy and sale of personal property on a writ of execution, though the levy itself be lawfully made, will render the officer a trespasser *ab initio*, if the sale be made on a less number of days' notice than is by law required to be given.⁶ Nor is it a matter to go in evidence in mitigation of damages, that the money made by the sale has been paid over by the officer to the plaintiff in execution in liquidation of so much of the plaintiff's demand.⁷

§ 1289. But a mistake in one of the three notices required for sale of personal property on execution, as to the numbers of the lands on which the property (corn in this case) intended to be sold is situated, will not vitiate the sale, where taking the whole notice and the surrounding circumstances together, persons reading the notice are sufficiently apprised of the locality.⁸

§ 1290. The officer, in selling, is to exercise such wholesome

¹ Tinkom *v.* Purdy, 5 Johns. 345; Russell *v.* Richards, 11 Maine, 371; Swortzell *v.* Martin, 16 Iowa, 519; Phelps *v.* Conover, 25 Ill. 309; Payne *v.* Birmingham, 10 Iowa, 360.

² Lantz *v.* Worthington, 4 Penn. St. 153.

³ Ibid.

⁴ Burroughs *v.* Wright, 19 Vt. 510.

⁵ Humphreys *v.* Browne, 19 La. Ann. 158.

⁶ Carrier *v.* Esbaugh, 70 Penn. St. 339; Ash *v.* Dawnay, 16 Eng. L. & Eq. 501; Kerr *v.* Sharp, 14 S. & R. 399; Mussey *v.* Cummings, 34 Maine, 74; Breck *v.* Blanchard, 20 N. H. 223; Purvington *v.* Loring, 7 Mass. 388; Van Dresor *v.* King, 34 Penn. St. 201; McMichael *v.* Mason, 13 Penn. St. 214.

⁷ Carrier *v.* Esbaugh, *supra*; McMichael *v.* Mason, *supra*; Wilson *v.* McElroy, 32 Penn. St. 82.

⁸ Pollard *v.* King, 63 Ill. 36.

and discriminating discretion in regard to the manner of selling, as a prudent person ordinarily would in reference to his own affairs under like circumstances, with a view to obtaining the best possible price for the property at a fair and honest sale. He should, therefore, in selling various articles of property, sell them separately, if intended for separate use, and not *en masse*, unless some of them be more suited to go together.¹ In the latter cases, such articles should be sold together, if thereby it is inferable that they would bring the better price, or be more generally acceptable to bidders. By separation, some articles intended to go together, would be measurably destroyed in value, while, on the other hand, the uniting others together would tend to force bidders to either forego the purchase of those desired or else buy such as they may not want.

§ 1291. One buying at execution sale, under his own execution, will not ordinarily be compelled to pay over the money to the officer, further than the costs of others than himself; but may receipt the writ, if there be no other writ in the officer's hands claiming priority or contribution. "It would be unreasonable and injurious to debtors as well as creditors, to insist that the creditor in the execution, should advance money on his bid, when the sole object of the sale is to put money in his pocket by paying a debt due to him."²

§ 1292. But if there be a dispute about the application or distribution of the money, in case of more than one writ, then the officer may refuse to deliver the property to the plaintiff without payment, or may sell again.³ The better course, however, would be to report the proceedings to the court, as we conceive, and have the priority settled.

§ 1293. In cases of execution sales made where there is a valuation law, the same principle prevails in sales of personal, as of real property.⁴ That is, if the liability occurred within the same jurisdiction wherein the sale is being made, then the sale must be in conformity to the law, as it was when the liability occurred, provided the proper data to enable the officer to con-

¹ 8 Bac. Abt. 704; Cresson *v.* Stout, 17 Johns. 116; McLeod *v.* Pearce, 2 Hawks, 110; Bevan *v.* Byrd, 3 Jones, L. 397.

² Nichols *v.* Ketcham, 19 Johns. 92; Russell *v.* Gibbs, 5 Cow. 390.

³ Ibid.; Swortzell *v.* Martin, 16 Iowa, 519, 526, 527.

⁴ See Ante, Ch. XV., Subdivision 15.

form in that respect, appears from the process.¹ If, however, the contract originate in one jurisdiction and the enforcement of it is in another, then the law of the State where and when it is being enforced is to govern the mode of sale.²

So, in like manner, if it do not appear where the liability occurred, then the enforcement is to be in accordance with the law as it exists at the place of sale at the time of rendition of the judgment.

Such are the general principles, as applicable to execution sales, of both personal and real property. But the result of a departure therefrom is not necessarily, in all cases, and in all the States, the same.

In *Rosier v. Hale*,³ the Supreme Court of Iowa, Lowe, Justice, held: "The doctrine laid down is, that the law in force when the contract is made is necessarily referred to and forms a part of the contract, and fixes the rights and obligations growing out of it, and that any substantial change in the law of the remedy which shall lessen its efficiency or burden it with new conditions and restrictions, comes within the constitutional prohibition."

§ 1294. By the statute of Nevada, it is required, as it is in most of the States, that perishable property, when levied on by an officer, by virtue of a writ of attachment, shall be sold in a summary manner, and the proceeds of sale be held in money, to answer the writ, and subject to the disposition of the court at the termination of the case.

By the term "perishable property," is meant such personal property as is in its nature, necessarily subject to, or likely to decay and depreciate in value by keeping. It is held by the courts of that State that *hay* does not come within the statute.

¹ *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 608; *Gantly's Lessee v. Ewing*, 3 How. 707; *Blair v. Williams*, 4 Litt. 34; *Lapsley v. Brashears*, Id. 47; *Pool v. Young*, 7 T. B. Mon. 587; *McKinney v. Carroll*, 5 T. B. Mon. 98; *Grayson v. Lilly*, 7 T. B. Mon. 6; *Smith v. Morse*, 2 Cal. 524; *Hunt v. Gregg*, 8 Blackf. 105; *Coriell v. Ham*, 4 G. Greene, 455; *Burton v. Emerson*, Id. 393; *Shaffer v. Bolander*, Id. 201; *Willard v. Longstreet*, 2 Doug. (Mich.) 172; *Quackenbush v. Danks*, 1 Denio, 128; *Rosier v. Hale*, 10 Iowa, 475.

² *Hutchins v. Barnett*, 19 Ind. 15; *Doe v. Collins*, 1 Ind. 24; *Shaffer v. Bolander*, 4 G. Greene, 201; *Story, Confl. of Laws*, Sec. 556.

³ 10 Iowa, 485.

That it is capable of preservation by the exercise of ordinary care on the part of the officer.¹

§ 1295. In Nevada, the levy or seizure of goods upon a writ of attachment, vests in the officer a special property therein, coupled with the right of possession, which together enables the officer to maintain an action against any person who interferes therewith without legal authority.²

But neither a property, or right of possession of any description is, by reason of such levy or seizure, vested in the plaintiff in the writ.³ The sheriff may levy such writs upon the interest of *one* of two owners who are tenants in common of personal property, and may, under such levy, take possession of the *whole*, but can sell only the undivided interest of the defendant to the writ. In such case, the owner of the other interest can not maintain replevin against the officer; and as each tenant in common or joint owner has an equal right of possession, except as against the custody of an officer, so the purchaser at the officer's sale may secure his purchase by taking and holding possession of the whole for himself and the other original owner jointly.

A seizure on process of any kind from a United States court, by a United States marshal, puts the property in *custody of the law*, and beyond the pale of State jurisdiction and State process, for the time being.⁴

§ 1296. The term perishable property, in the statute of Connecticut, which requires perishable property levied on execution, to be sold at the expiration of seven days, instead of twenty, the time designated for ordinary cases, means such property as is *subject to natural and speedy decay*.⁵

§ 1297. And under a similar provision as to property requiring the incurring expense, as when animals are levied on, the sale should be in seven days, as the keeping of them requires an outlay of money for the support of the animals; and this the officer will have a right to charge and retain out of the proceeds of sale.⁶

¹ Newman *v.* Kane, 9 Nevada, 234.

² Foulks *v.* Pegg, 6 Nevada, 136.

³ Ibid.

⁴ Feusier *v.* Lammon, 6 Nevada, 209.

⁵ Webster *v.* Peck, 31 Conn. 495.

⁶ Ibid.

XII. ITS EFFECT: WHAT PASSES BY IT.

§ 1298. The effect of an execution sale, realizing the amount of the execution, is a satisfaction of the judgment. Thereby it "ceases to exist." It loses its vitality. It can only be restored or revived by an order of court vacating satisfaction. The making of this order requires a judicial power equal to that which originally entered the judgment. No less a power can impart new life to it, when satisfied by the acts, valid for the time being, of an officer having power so to do.¹ Until such satisfaction be judicially vacated, and execution anew be ordered, no subsequent execution can legally issue on the judgment.² It is well said that "an execution executed is the end of the law."³

§ 1299. Payment of the money to the plaintiff satisfies the writ, by whomsoever the payment be made. The sheriff can not, of his own funds, pay off the creditor for the execution in his hands, or otherwise satisfy him, and retain the writ and its vitality to enforce the same against the defendant as the means of indemnifying himself. If he thus pay off the creditor, both writ and judgment are thereby satisfied, and are *functus officio*.⁴ This, too, irrespective of the inability of the officer to execute a writ for his own benefit. There remains, after such payment, no vital writ to be executed by any one. The vital force of both writ and judgment are, by the very act of payment, extinct.

§ 1300. The purchaser has a right to what he gets, and to nothing more. *Caveat emptor* is the rule. He takes only the interest of the defendant. If the defendant has no interest, then the buyer gets nothing; and he can not avoid payment by showing that the goods belonged to some one else.⁵ But if an innocent purchaser, he may have redress in equity against the execution debtor whose debt he has paid.⁶

§ 1301. By a sale of personal property on an execution against one of two common owners, the purchaser takes only the interest therein of the defendant in the writ. He becomes the tenant in

¹ Hughes *v.* Streeter, 24 Ill. 647, 649.

² Ibid.

³ 3 Bac. Abt. 687.

⁴ Sherman *v.* Boyce, 15 Johns. 446; Reed *v.* Pruyn, 7 Johns. 426.

⁵ Griffith *v.* Fowler, 18 Vt. 390; Popleston *v.* Skinner, 4 Dev. & Batt. 160; McGhee *v.* Ellis, 4 Litt. 244; Austin *v.* Tilden, 14 Vt. 325.

⁶ McGhee *v.* Ellis, *supra*.

common with the other owner. This, too, although the officer assumes to sell the whole.¹ Therefore, the common owner whose rights are not affected by the sale, can not maintain an action in reference to the transaction against the purchaser or the officer who sells.²

But if after levy and before sale, the execution defendant buys the interest of the other tenant in common in the property levied, then the officer, without further levy or notice, may sell the whole interest and entire property.³

§ 1302. If after levy on lands they be sowed in grain by the debtor, before execution sale, and then another execution be levied on the growing grain, and the same be sold thereon, the latter writ will be entitled to preference in the proceeds of the grain.⁴

§ 1303. A distinction is taken, and with great reason, between a sale of the property itself and of the mere interest of the debtor therein. In the former case the purchaser takes the property with its legal incidents, while in the latter he takes only the interest which the debtor, as such, has and may himself enforce.⁵

§ 1304. To a purchaser of growing grain, at execution sale, on execution against the owner, the right to enter and take away the grain, or to secure, harvest and preserve it, passes with the property to the purchaser; neither the purchaser nor officer will be liable to an action for acts necessary and proper to be done by them in regard to it.⁶ But in an action therefor it is not sufficient that they justify under execution sale; but the plea must show the execution to have been against the owner of the property levied and sold. A mere allegation of purchase on execution sale, generally, will not amount to a defense.⁷

§ 1305. Ordinarily, only the interest of the execution debtor in personal property, levied on and sold as his, on execution against him, passes by the sale. If the property belong to another, and no act be done by him estopping him from claiming the property, no title or right thereto passes to the purchaser.⁸

¹ Popleston *v.* Skinner, 4 Dev. & Batt. 160.

² Fiero *v.* Betts, 2 Barb. 633; Wilson *v.* Reed, 3 Johns. 175; White *v.* Osborn, 21 Wend. 75.

³ Birdseye *v.* Ray, 4 Hill, 158.

⁴ Stambaugh *v.* Yeates, 2 Rawle, 161.

⁵ True *v.* Congdon, 44 N. H. 48.

⁶ Terril *v.* Thompson, 3 Bibb, 273.

⁷ Ibid.

⁸ Champney *v.* Smith, 15 Gray, 512; Furrow *v.* Chapin, 13 Kan. 107. (And

For any acts of the purchaser of assumed ownership and control over the property, he is liable to the same extent and in like manner to an action as he would be for similar acts if no sale or purchase had ever been made of the property.¹ The rule is the same in England. Such sales are not in that respect like sales in *overt market*. *Shaw v. Tunbridge*, 2 W. Bl. 1064.

§ 1306. The sale of personal effects, if fair, and the execution be valid, carries to the purchaser, as has been said, the title and right of the debtor to the property.² But if the writ be void, the sale is also void, and the purchaser takes nothing.³

If the sale be void, or voidable, by reason of impropriety of conduct on the part of the officer in selling, the court may set the same aside without the intervention of a court of chancery.⁴

§ 1307. Though execution sales are usually valid as against mere irregularities, this is more especially so with sales of personal property where the levy vests a species of ownership in the officer, and the possession of the property sold is delivered over to the purchaser.⁵ Yet no sale and delivery will confer title where the officer has no power to sell. Thus where certain property is exempt from levy and sale, and is so designated by a description in law that no further identity is required to know it, the officer has no more power or legal right to levy and sell it than if it belonged to a stranger to the writ, or than he would have without the writ, and, therefore, if he does sell, the sale is void and the officer becomes a trespasser.⁶ For the authority of an officer to sell property on execution is not given by the common law, but is the creature of statute law. It is unlike a sale in England in *market overt*. The sale of the property of one person on an execution against another and different person, is in itself invalid, and the real owner may maintain replevin for

the rule is the same if the wife's property is taken for the debt of the husband.) *Ibid.*⁷

¹ *Champney v. Smith*, 15 Gray, 512; *Buffum v. Deane*, 8 Cush. 41; *Stone v. Ebberly*, 1 Bay, 317; *Furrow v. Chapin*, 13 Kan. 107.

² *Hamilton v. Shrewsbury*, 4 Rand. 427. The purchaser makes proof of title by showing a judgment, execution and sale, to himself. *Ponder v. Moseley*, 2 Fla. 207. And a reversal of the judgment does not affect his rights, if he be a *bona fide* purchaser. *Ibid.*

³ *Hamilton v. Shrewsbury*, *supra*.

⁴ *Ibid.*

⁵ *Wheaton v. Sexton's Lessee*, 4 Wheat. 503.

⁶ *Williams v. Miller*, 16 Conn. 146.

the property.¹ A sale on valid process, even though irregular, or the provisions of law be not substantially complied with, will carry to the purchaser the interest of the execution debtor in the property sold, but not that of a stranger.² And though it pass the interest of the execution *debtor*, if the writ be valid, so that he may not follow and replevy the property of the purchaser, yet he may, as we have seen, maintain an action against the officer for selling illegally.³

§ 1308. By the statute of 1833, in New York, mortgages of personal property, where the property continues in the possession of the mortgageor, must be filed for record, and being so filed, remain in force, if not satisfied for one year, as against creditors of the mortgageor; but after the end of the year are of no validity whatever as against such creditors, unless they be renewed. Where an execution levy was made upon personal property thus mortgaged, after the expiration of the year and before the renewing of the mortgage, it is held that the levy was valid, and a sale on the execution in pursuance thereof carried a right to the property, not only as against the execution debtor, but also against the claims of the mortgagee.⁴

§ 1309. Previous to the enactment of the statute of 1833, chattel mortgages might be good although possession of the mortgaged property continued in the mortgageor. It was open to explanation, and if the explanation was satisfactory in law, the mortgage was valid, although no change of the possession of the mortgaged property had taken place. Each case stood simply upon its own merits.⁵

XIII. VOID AND VOIDABLE SALES.

§ 1310. Execution sales of personal property, as is the case in similar sales of real property, made on execution that are satisfied, or that issued on satisfied judgments, are universally regarded as void when the purchaser buys or pays with knowl-

¹ Coombs *v.* Gorden, 59 Maine, 111.

² Ibid.

³ Sawyer *v.* Wilson, 61 Maine, 529.

⁴ Porter *v.* Parmley, 52 N. Y. 185. And a sale of *all the right* of the *debtor* in the property, in such a case, is a sale of the property itself. Ibid.

⁵ Newell *v.* Warren, 44 N. Y. 244, 248; Hall *v.* Tuttle, 8 Wend. 375; Barrow *v.* Paxton, 5 Johns. 258; Bissell *v.* Hopkins, 3 Cow. 166; Smith *v.* Acker, 23 Wend. 653.

edge of such satisfaction.¹ And whether the purchaser has such knowledge or not, the better authority is that the sale being on a power that is exhausted, the sale is void. It is no better than a sale upon a void judgment. It can not, under the usual circumstances, be sustained.² But if the execution debtor, with knowledge of such satisfaction, silently stand by and suffer others to purchase, or do acts calculated to mislead a buyer in making such purchase, it is a fraud on his part, and he is estopped to deny the validity of the sale.³

§ 1311. A sale fraudulent in itself, though made under color of execution, is of no validity, and, therefore, where the process of the court is prostituted to the fraudulent purpose of hindering and delaying other creditors, under semblance of a real sale, the transaction will be treated as fraudulent and void.⁴

§ 1312. In Louisiana, debts due to an execution debtor are subject to levy and sale, but are required to be appraised, before sale, at cash value, and to be sold for not less than two-thirds of such value. It is held, in that State, that a sale of such interest on execution, without appraisement, though in other respects regular, is void.⁵

XIV. WHO MAY NOT BUY.

§ 1313. The same person may not both buy and sell by mere force of the process. Nor will his return thereof on the writ show such title in him as will be regarded of any validity, even as against a trespasser.⁶ In the case here cited from Vermont, the title to certain cattle was involved. The sheriff claimed to own them by purchase at an execution sale made by himself. Though the levy vested a special property in the sheriff, yet the

¹ *Jackson v. Anderson*, 4 Wend. 474; *Neilson v. Neilson*, 5 Barb. 565.

² *Neilson v. Neilson*, *supra*; *Jackson v. Anderson*, *supra*; *Chiles v. Bernard's Exrs.*, 3 Dana, 95, 96; *Mouchat v. Brown*, 3 Rich. L. 117; *Laval v. Rowley*, 17 Ind. 36; *State v. Salyers*, 19 Ind. 432; *Sherman v. Boyce*, 15 Johns. 443; *Jackson v. Cadwell*, 1 Cow. 622; *Hammatt v. Wyman*, 9 Mass. 138; *Lewis v. Palmer*, 6 Wend. 368.

³ *Wood v. Colvin*, 2 Hill, 566; *Jackson v. Cadwell*, 1 Cow. 622.

⁴ *Stephens' Admr. v. Barnett*, 7 Dana, 257; *Corlies v. Standbridge*, 5 Rawle, 286; *Yoder v. Standiford*, 7 T. B. Mon. 478, 485.

⁵ *Collier v. Stanbrough*, 6 How. 14.

⁶ *Woodbury v. Parker*, 19 Vt. 353. See also *Mills v. Goodsell*, 5 Conn. 475; *Pierce v. Benjamin*, 14 Pick. 359; *Perkins v. Thompson*, 3 N. H. 144; *Worland v. Kimberlin*, 6 T. B. Mon. 608.

levy had become merged in the sale. So he had no longer a claim under it. Thus, the sole question, say the court, was "whether an officer acting under legal process can sell property to himself." They add that, "according to all the authorities, such an officer, in addition to his character as a minister of the law, is regarded as a sort of trustee and agent both of the creditor and debtor. The two characters place him on higher and more responsible ground than a mere private trustee or agent. And if the latter is not permitted to acquire a personal interest in the matter of his agency, much less should such indulgence be granted to the former." In the same case the court lay down the rule that even if the purchase be made by consent of plaintiff and defendant in the writ, that though it might then, as between the officer himself and the parties, be valid, yet it would amount to no more than a purchase from the defendant himself, and it would in nowise partake of the sanctity of an execution sale.

§ 1314. But if the writ of execution be directed to his principal, and the sale be made by him, and the deputy be the execution creditor, then such deputy, it is believed, may rightfully purchase at the sale of his principal, if it be fairly made.¹ And such, too, is believed to be the rule, whether the sale be of personality or of realty. It is equally the interest of debtor and creditor that the execution creditor shall, in such case, be allowed to bid. It is very different from a case in which the principal sheriff is plaintiff and his deputy sells. In this case the court say, in reference to the act of Assembly which prohibits a sheriff from buying at execution sales: "It could never have been the intention of the Legislature to have prevented a deputy sheriff, when plaintiff in an execution sale, from bidding, in order to secure his money. The object was to prevent abuse."²

§ 1315. In Massachusetts, it is held that a sale made under an appraisement law, where a brother of the execution creditor was one of the appraisers, is illegal, and moreover, that thereby the officer selling becomes a trespasser,³ and the sale will be set aside.

§ 1316. If notice of sale of personality be invalid for insufficient time, then it is not rendered valid by an adjournment to

¹ Jackson v. Collins, 3 Cow. 89.

² Ibid.

³ McGough v. Wellington, 6 Allen, 505.

a subsequent day, although such subsequent day would be a legal time if appointed by the original notice.¹ The postponement of the sale, does not cure the defect of the original notice. If there is no notice sufficient upon which to sell, there is no notice sufficient for a postponement. The power is not cumulative by adjournment, and is no greater on the subsequent day than it was upon the first, and sales made under such circumstances are without authority, and subject the officer to an action of trespass.²

XV. WHEN THE OFFICER MAY RE-SELL.

§ 1317. If the terms of sale are not promptly complied with by the purchaser by payment of the purchase money, the officer may sell again without further notice, at the same time and place.³ But not within the time allowed, if any, by terms of sale, for payment to be made.⁴

All such sales are for cash, and ought to be for cash in hand; if the purchaser do not comply, it is adjudged in some cases that he may be compelled to make good the deficiency in price, if any, on the re-sale of the property.⁵

XVI. THE OFFICER'S FEES, AND CHARGES.

§ 1318. In law, the officer selling, is restricted in compensation for levy and care of the property, and services rendered, to the compensation allowed and the fees given by law to his office. More than that he can not claim. At common law, a sheriff was not entitled to any fees. Outside, then, of the common law he is entitled to what is given by the statute.⁶ The officer levy-

¹ Sawyer *v.* Wilson, 61 Maine, 529.

² Ibid.; Tuttle *v.* Gates, 24 Maine, 398. And so, if the officer sell at an adjourned sale without giving the statutory notice required, of the day adjourned to, the sale is illegal, and he is liable as a trespasser although the notice of the first day of sale be sufficient. Hayes *v.* Buzzell, 60 Maine, 205.

³ Illingworth *v.* Miltenberger, 11 Mo. 80; Wilson *v.* Loring, 7 Mass. 392; Haynes *v.* Breaux, 16 La. Ann. 142; Saur *v.* Steinbauer, 14 Wis. 70; Gaskell *v.* Morris, 7 W. & S. 32; Bigley *v.* Risher, 63 Penn. St. 152.

⁴ Conway *v.* Nolte, 11 Mo. 74.

⁵ Lamkin *v.* Crawford, 8 Ala. 153; Minter *v.* Dent, 2 Bailey, 291.

⁶ Crofut *v.* Brandt, 58 New York, 106; Hatch *v.* Mann, 15 Wend. 44; Lynch *v.* Meyers, 3 Daly, 256; Downing *v.* Marshall, 37 N. Y. 380, 388; Benedict *v.* Warriner, 14 How. Pr. 568; Mallory *v.* The Supervisors, 2 Cow. 531; Campbell *v.* Cothran, 56 N. Y. 279. And the adjudications in England are similar.

ing upon personal property may incur expense in preserving it, and in removing it, and necessarily so, for if it perishes on his hands, or is lost, for want of ordinary care, he is liable for the value of it. Yet for all these duties and expenses, if the statute gives no compensation, then in law he is entitled to none. It is, in law, contemplated that the poundage of the officer and his fees, in other respects, incident to his office, will sufficiently remunerate him for these burdens cast upon it.¹ In the language of the court, in *Crofut v. Brandt*, "The sheriff is restricted to the fees given to his office by statute."² But whether, if upon request of and promise to pay, by either party to the writ, and for such party's convenience or benefit, expenses be incurred by the officer, the court, in *Crofut v. Brandt*, not finding it necessary, to the case, do not decide;³ and whether the officer would be entitled to remuneration, in the absence of any statutory provision giving it, for food and nourishment furnished live animals

Graham *v.* Grill, 2 M. & S. 294; Dew *v.* Parsons, 1 Chitty, 295; Deacon *v.* Morris, 18 Eng. C. L. 86; Rex *v.* Jetherell, Parker, 177; Comyn's Dig. *Visecount*, F. 1; Lane *v.* Sewell, 1 Chitty, 175; Slater *v.* Hames, 7 M. & W. 418; Baker *v.* Davenport, 8 D. & R. 608; Bilke *v.* Havelock, 3 Camp. 374; Halliwell *v.* Heywood, 10 W. R. 780; Gaskell *v.* Sefton, 14 M. & W. 802; Davies *v.* Elmonds, 12 M. & W. 31; Rex *v.* Crackenthorp, 2 Anst. 412; Phillips *v.* Canterbury, 11 M. & W. 619; Mitchell *v.* Reynolds, 10 Mod. 139. The payment of fees to the officer was first impliedly provided for by the Statute of 29th Elizabeth, Chapter IV.

¹ *Crofut v. Brandt*, 58 N. Y. 110, 111. Whether the officer may charge expenses of insurance, is doubted. *White v. Madison*, 26 N. Y. 117, 127. There are cases, however, of services performed by officers for the public, where no compensation is prescribed therefor, and yet allowances were made and paid for the services rendered. As advances to pay for record books; serving notices for the county; attendance of judge to drawing of jurors. *Bright v. Suprs. of Chenango*, 18 John. 243; *The People v. Suprs. of Albany*, 12 Wend. 257; *Doubleday v. Suprs. of Broome*, 2 Cow. 533. In the latter case, doubts are expressed by *SUTHERLAND, J.*, as the services were required by law, while in most of the allowances the cases were such in which no legal obligation compelled the performance of the service or act, as in *Wathen v. Sandys*, 2 Camp. 640, where a distinction on that ground is drawn as a ground for allowance. In *Crocker on Sheriffs*, 2 Ed. p. 360, Sec. 824, and p. 478, Sec. 1144, *Smith v. Birdsall*, 9 John. 328, is cited as authority for such allowances, so far as what is reasonable; but by recurrence to the original case it is seen that the language of the court is, that if *they allow anything*, it is to be what is reasonable; and this case is considered of doubtful authority. See *Crofut v. Brandt*, 58 N. Y. 114, 115.

² 58 N. Y. 116.

³ *Ibid.*

levied on and retained in his custody, the court expressly decline to determine, as not involved in the case. In England, however, in *Gaskell v. Sefton*, 14 M. & W. 802, it is conceded that under the statute there, as it then was, the expense of keeping the cattle levied on, ought to be allowed to the officer. And in *Sly v. Finch*, Cro. Jac. 514, it is intimated, but as a mere *dictum*, that if cattle in the possession of an officer, under a levy, die for want of food, the officer is liable. To our mind, however, it is clearly the duty of the officer, in such cases, to do what is *necessary* to the preservation of the property, and as clearly within the power of the court whence the process issues, to allow compensation where the life of the property depends on it. It is a *legal necessity*. By the term *poundage* is meant the commissions of the officer upon the amount realized from the sale.¹ But if instead of realizing the money, on a *fi. fa.*, the body of the defendant was taken on a *ca. sa.*, then the allowance of commission was upon the sum demanded by the *ca. sa.*, and for which the body was taken; for by the taking of the body the writ is satisfied. The original English statute did not make the defendant liable for the officer's poundage fees, but the plaintiff was bound to pay the same, and so the law remained, until by the Statute 43 of George III., Chapter 46, the officer was allowed to levy his poundage of the defendant in addition to the debt.²

XVII. DISAFFIRMANCE OF EXECUTION SALE.

§ 1319. If an officer levy and sell personal property upon an execution, and receive the purchase money of the purchaser, without disclosing the fact of another execution then being in his hands, and after the sale and payment, produce another writ and levy it on the same property, and remove it so as to prevent the purchaser from taking possession thereof, the sale is thereby disaffirmed, and the purchaser may recover back the purchase money so paid by him, in an action at law against the officer.³ But to avoid the sale, he must return the property, if he has received the same.⁴

¹ *Campbell v. Cothran*, 56 N. Y. 279, 281.

² *Ibid.*, 282, 283.

³ *Thurley v. O'Connell*, 48 Mo. 27.

⁴ *Andrews v. Richardson*, 21 Tex. 287.

CHAPTER XX.

EXECUTION SALES OF CORPORATE FRANCHISES, PROPERTY
AND STOCK.

- I. AT COMMON LAW.
- II. BY STATUTE.
- III. EFFECT OF SALE.

I. AT COMMON LAW.

§ 1320. The Supreme Court of the United States, recognizing the rule that corporate franchises, being incorporeal hereditaments, can not, upon the settled principles of the common law, be seized and sold on execution, declare that if they can be sold, in any of the States, "it must be under statutory provision." Such, too, is the current of authorities.¹

§ 1321. Nor can the lands, easements, or works appurtenant to, or essential to the use and practical operation of the franchise, be levied and sold on execution at law, separate from the franchise, so as to impair its value or impede its use.² Neither are

¹ Gue *v.* Tide Water Canal Co., 24 How. 263; James *v.* Pontiac & Groveland Plankroad Co., 8 Mich. 91, Coe *v.* Columbus, Piqua & Ind. R. R. Co., 10 Ohio St. 372; Seymour *v.* Milford & Chil. Turnpike Co., 10 Ohio, 476, 480; Stewart *v.* Jones, 40 Mo. 140; Youngman *v.* Elmira & W. R. R. Co., 65 Penn. St. 278; Western Penn. R. R. Co. *v.* Johnston, 59 Penn. St. 290; Atkinson *v.* Marietta & C. R. R. Co., 15 Ohio St. 21, Susquehanna Canal Co. *v.* Bonham, 9 W. & S. 27, 28, Wood *v.* Truckee Turnpike Co., 24 Cal. 474; Munroe *v.* Thomas, 5 Cal. 470; Thomas *v.* Armstrong, 7 Cal. 286; Hatcher *v.* Toledo, W. & W. R. R. Co., 62 Ill. 477; Bruffett *v.* Great Western R. R. Co., 25 Ill. 353. And in the case of Ludlow *v.* Hurd, 6 Am. Law Reg. O. S. 493, 502, the Superior Court of Cincinnati cites several cases to support its view, and says: "It is settled, we suppose definitely, that the franchise which includes the right of toll can not be levied on and sold, unless the Legislature who granted it assent to the transfer." This decision, though by a *nisi prius* court, is a very clear and exhaustive one. See also Gwynne on Sheriffs, pp. 239, et seq.; Shaw *v.* Norfolk Co. R. R. Co., 5 Gray, 362.

² Gue *v.* Tide Water Canal Co., 24 How. 257; Ammant *v.* New Alexandria & Pitt. Turnpike Co., 13 S. & R. 212; Susquehanna Canal Co. *v.* Bonham, 9 W. & S. 27; Plymouth R. R. Co. *v.* Colwell, 39 Penn. St. 337; Coe *v.* Columbus, Piqua & Ind. R. R. Co., 10 Ohio St. 372; Youngman *v.* Elmira & W. R. R. Co., 65 Penn. St. 278.

the tolls or product of the franchise subject to such levy and sale, so as to prevent the company from demanding and receiving the same, or so as to divest it of its right of ownership and possession.¹

§ 1322. A railroad, if subject to execution sale at all, can not be cut up into parcels and sold at different sales, in the different counties in which it is situate ; it would defeat the purposes of

¹ Gue *v.* Tide Water Canal Co., 24 How. 263; Leedom *v.* Plymouth R. R. Co., 5 W.& S. 265 ; Seymour *v.* Milford & Chil. Turnpike Co., 10 Ohio, 479. In the case cited above of Gue *v.* Tide Water Canal Co., a *fieri facias* issued to the U. S. Marshal for the district of Maryland, who "seized and advertised for sale a house and lot, sundry canal locks, a wharf, and sundry other lots," which belonged to the defendant, the Tide Water Canal Company, in fee. The Company obtained an injunction against the sale, and the same was made perpetual in the Circuit Court of the United States for said Maryland district. From the decree perpetuating the injunction the case was appealed by Gue to the United States Supreme Court. There the decree was affirmed. We insert here the following extract from the opinion of the United States Supreme Court: "Now it is very clear that the franchise, or right to take toll, on boats going through the canal, would not pass to the purchaser under this execution. The franchise, being an incorporeal hereditament, can not, upon the settled principles of the common law, be seized under a *fieri facias*. If it can be done in any of the States, it must be under a statutory provision of the State ; and there is no statute of Maryland changing the common law in this respect. Indeed, the Marshal's return and the agreement of the parties show it was not seized, and consequently, if the sale had taken place, the result would have been to destroy utterly the value of the property owned by the company, while the creditor himself would most probably realize scarcely anything from the useless canal locks and lots adjoining them. The record and proceedings before us show that there were other creditors of the corporation to a large amount, some of whom loaned money to carry on the enterprise. And it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity, to permit him to destroy the value of the property of the stockholders by dis severing from the franchise property which was essential to its useful existence. In this view of the subject, the court do not deem it proper to express any opinion as to the right of this creditor in some other form of judicial proceeding to compel the sale of the whole property of the corporation, including the franchise, for the payment of his debt. * * * * If the appellant has a right to enforce the sale of the whole property, including the franchise, his remedy is in a court of chancery, where the rights and priorities of all the creditors may be considered and protected, and the property of the corporation disposed of to the best advantage for the benefit of all concerned. A court of common law, from the nature of its jurisdiction and modes of proceeding, is incapable of accomplishing this object; and the court was right in granting the injunction, and its decree is therefore affirmed." See also Ludlow *v.* Hurd, 6 Am. Law Reg. O. S. 502.

the law in reference to the road.¹ Nor can the turn-tables of the road, or freight cars found on the road or on the side tracks thereof, be levied and sold on execution at law against a railroad company; they are a part of the realty, are incident to the franchise, and can not be thus severed and sold.² So, likewise, stocks or shares in corporate companies may not, except by statute, be taken on execution and sold at law.³ But in New Hampshire it has been held that locomotive engines, passenger cars and freight cars of a railroad corporation are liable to attachment and execution sale when not in actual use.⁴

§ 1323. In Pennsylvania, it is held that the right of way and road bed of a railroad corporation, assessed to the company "as a right of way or passage, with such occupancy as is necessary to give this right effect," being a mere easement, is not the subject of execution sale. The court say: "This being the nature of the interest acquired by a railroad company in land appropriated for the use of its railroad, a mere easement or right of passage for a public purpose, it is a settled principle in our law that this interest is not the subject of a lien or sale under execution."⁵

§ 1324. In California, it is held that a sale of the road of a corporate company on execution at law passes no title to the franchise or to the road. In *Wood v. Truckee Turnpike Co.*,⁶ the court say, SHAFTER, Justice: "The plaintiff acquired nothing by the purchase of the 'road' to which the action of ejectment has any remedial relations."

¹ Macon & West. R. R. Co. v. Parker, 9 Geo. 377.

² Titus v. Mabee, 25 Ill. 257; Seymour v. Milford & Chil. Turnpike Co., 10 Ohio, 476, 480; Hunt v. Bullock, 23 Ill. 320; Palmer v. Forbes, 23 Ill. 301. In Seymour v. Milford & Chil. Turnpike Co., the Supreme Court of Ohio hold the following language: "There can be no doubt that the right of taking toll upon a turnpike road is a franchise, and is not at common law, nor by our law regulating judgments and executions, the proper subject upon which to levy an execution."

³ James v. Pontiac & Groveland Plankroad Co., 8 Mich. 91; Titcomb v. Union Marine and Fire Ins. Co., 8 Mass. 326; Taylor v. Jerkins, 6 Jones' L. 316.

⁴ Boston, Concord & Montreal R. R. Co. v. Gilmore, 37 N. H. 410.

⁵ Western Penn. R. R. Co. v. Johnston, 59 Penn. St. 290, 294; Ammant v. New Alexandria & Pitts. Turnpike Co., 13 S. & R. 210; Ridge Turnpike Co. v. Stoever, 2 W. & S. 548; Leedom v. Plymouth R. R. Co., 5 W. & S. 265; Susquehanna Canal Co. v. Bonham, 9 W. & S. 27.

⁶ 24 Cal. 474, 478.

§ 1325. Nor can the capital stock of an inter-State corporation, which by statute is declared real estate, be levied and sold in either State on process from the State courts.¹

As early as 1812 the question arose in North Carolina of the liability of capital stock of a private corporation to be levied and sold upon execution. The States of Virginia and North Carolina incorporated the Dismal Swamp Canal Company, the work to exist partly in each of said States, and declared the shares real estate. The sheriff (in North Carolina) sold certain of these shares on a writ of execution issued from and on a judgment of the superior court of law at Edenton, in North Carolina. The execution purchaser brought suit in equity to compel the president and directors to register his deed of purchase executed to him by the sheriff. The court held that although the shares were made real property by law, that it was so done for the purpose of giving them an inheritable status in law; and that if such realty was liable to be sold on execution for debt, it is so as savoring of and issuing from the land of the corporation, situated partly in each of said States; and in which States, respectively, they have locality, part of the land being in Virginia and part in North Carolina. That the courts of North Carolina had no jurisdiction of the part of the lands thus situated in Virginia, and could not sell the same or any interest by virtue of the State process, and that as a sequence, the shares being indivisible, the sale was also inoperative as to the interest or land situated in North Carolina, since there could be no severance of the shares.²

§ 1326. The common law remedy by sequestration was substantially enacted in Pennsylvania by the act of 16th of June, 1836, which act, so far as applicable to the remedy, but not as to the distribution of moneys made, was superseded by the act of April 7th, 1870, which authorizes the levy and sale on execution of the property, franchises and rights of a debtor corporation.³

In superseding the remedy of sequestration, however, and providing for sales on execution, the principles of the law were not changed in relation to the distribution of the funds to be raised on execution sale. They are still to be distributed *pro rata* between creditors, as in cases of insolvents, and not on priority

¹ Cooper v. The Dismal Swamp Canal Co., 2 Murph. 195.

² Ibid.

³ Bayard's Appeal, 72 Penn. St. 453.

of date of either judgments or executions, as they are not liens upon this description of property unless made so by statute.¹

Thus we see that at common law, the remedy of the execution creditor, so far as regards property thus not liable to execution, and as to the franchises and interests of a corporation, is by process of *sequestration*, which can only be had at common law after a return of execution *nulla bona*, and it remaining unsatisfied. If outside property not servient to corporate uses and purposes was found, the officer levied and sold it as in other cases; but if not found, then on return of the execution unsatisfied, and the stating of that fact, the process of *sequestration* was issued upon request.²

II. BY STATUTE.

§ 1327. As authority to make such sales on executions at law can exist only by express statute, it follows that they can only be made in such manner as the statute prescribes.³ There must be a substantial conformity to the statutory method of sale, otherwise no right will pass by the sale. Where the sale by the statute should have been to the one who for the shortest period of user would pay the debt and costs, and it was made for an absolute term, for part only of the debt and costs, the sale was held to be void.⁴ Nor will the mere acquiescence of the stockholders, or taking possession by the purchaser, give validity to the sale.⁵

¹ Bayard's Appeal, 72 Penn. St. 453.

² Ibid.

³ Gue *v.* Tide Water Canal Co., 24 How. 257; James *v.* Pontiac & Groveland Plankroad Co., 8 Mich. 91; Titcomb *v.* Union Marine and Fire Ins. Co., 8 Mass. 326; Taylor *v.* Jenkins, 6 Jones L. 316; Seymour *v.* Milford & Chil. Turnpike Co., 5 Ohio, 476; Howe *v.* Starkweather, 17 Mass. 240; Davis *v.* Maynard, 9 Mass. 242; Stamford Bank *v.* Ferris, 17 Conn. 259.

⁴ James *v.* Pontiac & Groveland Plankroad Co., 8 Mich. 91; Taylor *v.* Jenkins, 6 Jones L. 316. There is this distinction in that respect between ordinary execution sales of personal property. There the levy is accompanied with tangible possession. It vests a special property in the officer, and the title passes to the purchaser with the delivery of the property by the officer, whether the sale be regular or not. But in sales of shares in an incorporated company, the interest being intangible and incapable of delivery, the title must pass by legal transfer, else not at all. Hence, if the sale be not in accordance with the substantial requirements of the statute, it will be inoperative, and will not confer title on the purchaser. (Titcomb *v.* Union Marine & Fire Ins. Co., 8 Mass. 326; Howe *v.* Starkweather, 17 Mass. 240.)

⁵ James *v.* Pontiac & Groveland Plankroad Co., 8 Mich. 91.

§ 1328. In *Davis v. Maynard*, it is held that such conformity must be shown by the purchaser in case of litigation involving the validity of the sale; that such showing should be by the officer's return embodying the evidences of the required conformity; and that, therefore, without a return of the officer, the purchaser takes nothing.¹

§ 1329. Selling on different notice than that required by the statute will (for instance) render the sale void.²

§ 1330. A sale and transfer of bank stock to the bank by a stockholder, after imperfect levy of a writ of attachment thereon, and before levy of execution in the attachment proceedings, carries title to the stock as against an execution sale in the proceedings by attachment.³

§ 1331. The modern tendency is, in the absence of statutory declaration on the subject, to regard stocks or shares of incorporated companies as a personal interest, even where the tangible effects or property of the company is real property.⁴ They are not strictly chattels, but a mere interest of a personal nature, and the certificates are but the evidence of such interest, and are of no value in themselves other than as the best proof of ownership of the interest which they represent.⁵

§ 1332. The current of authority is, as we have seen,⁶ that

¹ 9 Mass. 241; *Hammatt v. Wyman*, 9 Mass. 138. *Howe v. Starkweather*, 17 Mass. 240.

² *Howe v. Starkweather*, 17 Mass. 240; *Tilcomb v. Union Marine & Fire Ins. Co.*, 8 Mass. 326.

³ *Stamford Bank v. Ferris*, 17 Conn. 259.

⁴ 1 Redfield on Railways, 119, et seq.; *Gilpin v. Howell*, 5 Penn. St. 57; *Slaymaker v. Gettysburg Bank*, 10 Penn. St. 373; *Angell & Ames, Corps. Secs.* 557, 558, 559; *Tippets v. Walker*, 4 Mass. 595; *Johns v. Johns*, 1 Ohio St. 350; *Arnold v. Ruggles*, 1 R. I. 165; *Howe v. Starkweather*, 17 Mass. 240, 243; *Denton v. Livingston*, 9 Johns. 97, 100; *Planters & Merchants' Bank v. Leavens*, 4 Ala. 753; *State v. The Franklin Bank*, 10 Ohio, 91. But otherwise, if the property be land, and is vested, not in the corporation, but in the individual shareholders. *Angell & Ames, Corps. Sec.* 559.

⁵ *Angell & Ames, Corps. Secs.* 560, 561; *Agricultural Bank v. Burr*, 24 Maine, 256; *Agricultural Bank v. Wilson*, Id. 273; *Slaymaker v. Gettysburg Bank*, 10 Penn. St. 373.

⁶ *Gue v. Tide Water Canal Co.* 24 How, 257, and ante No. 1 of this chapter, *Evans v. Monot*, 4 Jones' Eq. 227; *Ross v. Ross*, 25 Geo. 297; *Angell & Ames, Corps. Secs.* 588, 589; *James v. Pontiac & Groveland Plankroad Co.*, 8 Mich. 91; *Coe v. Columbus, P. & I. R. R. Co.*, 10 Ohio St. 372; *Western Penn. R. Co. v. Johnston*, 59 Penn. St. 290; *Stewart v. Jones*, 40 Mo. 140.

such interest is not liable to levy and sale on execution at common law, but is only so by statute.¹

When thus liable, a sale thereof on execution at law emanating in attachment proceedings, fairly made to a *bona fide* purchaser, will override a sale and transfer of certificates previously made in good faith, if no notice be given to the corporation of such sale.²

§ 1333. A State, or municipal government, or corporation, by becoming a stockholder in a business corporation, descends to the level of individual stockholders of the same company; can claim no rights and no exemption but those which private stockholders may claim.³ As a sequence from this it would seem to follow, that if shares of ordinary or private stockholders are by law liable to execution sale, so are those of the State or municipal corporation, except that so far as relates to the shares of a sovereign State, it not being liable to suit there can be no writ of execution against it. But what property or interests a municipal corporation may buy it may also sell, unless there be a restraining clause in the charter or the law to the contrary;⁴ and it is well settled that what an owner may sell himself, may be sold on execution, if there be no law to the contrary.⁵

§ 1334. When shares of stock are levied on by more than one execution, and sold under the senior levy, the surplus funds, if any, must be paid over on the junior levy.⁶

§ 1335. A requirement of the act of incorporation, where the incorporation is by act of Assembly, defining the manner of executing and selling stocks or shares, supersedes in that respect the general law of anterior date as to execution sales, and must be conformed to.⁷

§ 1336. Where the officers of a turnpike company procured

¹ Angell & Ames, Corps. Secs. 588, 589; Foster *v.* Potter, 37 Mo. 525; Gue *v.* Tide Water Canal Co., 4 How. 257; Weaver *v.* Huntingdon, etc., R. R. Co., 50 Penn. St. 314; Howe *v.* Starkweather, 17 Mass. 240; Denny *v.* Hamilton, 16 Mass. 402, 405; Planters & Merchants' Bank *v.* Leavens, 4 Ala. 753.

² Blanchard *v.* Dedham Gas Co., 12 Gray, 213; Naglee *v.* Pacific Wharf Co., 20 Cal. 529; Littell *v.* Scranton Gas Co., 42 Penn. St. 500; Weaver *v.* Huntingdon, etc., R. R. Co., 50 Penn. St. 314.

³ Bank U. S. *v.* Planters' Bank, 9 Wheat. 904.

⁴ Newark Town Council *v.* Elliott, 5 Ohio St. 113, 121.

⁵ Coombs *v.* Jordan, 3 Bland Ch. 284; Cape Sable Co.'s Case, *Ibid.* 640.

⁶ Denny *v.* Hamilton, 16 Mass. 402.

⁷ Titcomb *v.* Union Marine & Fire Ins. Co., 8 Mass. 326.

shares in the company sold on execution to be bought in for the company, and then appropriated a part thereof to themselves, it was held that suit therefor lay against them by a shareholder for his damages.¹

§ 1337. An execution purchaser of hypothecated stocks, knowing them to be such, takes subject to the right of the pledgee.² But the contrary is the ruling if bought in good faith and without notice.³

§ 1338. If a company, by its by-laws, have a lien on the stock of its stockholders, an execution purchaser with notice thereof will be postponed in favor of the company.⁴

§ 1339. A purchaser of mortgaged stocks at execution sale takes subject to the mortgage, but is entitled to the surplus proceeds of the mortgage sale, if any.⁵

§ 1340. The court lay down the rule, in *Weaver v. The Huntingdon, etc., Railroad Company*, that railroad stocks, in Pennsylvania, standing on the books in the name of the real owner, are liable to levy and sale on execution against such owner; but bank stocks, in the same State, being ordinarily by law of the State subject to liens for any indebtedness of the stockholder to the bank, should be levied by attachment proceedings and garnishee, in which the precise interest of the debtor is necessarily ascertained, whereby useless expenses and litigation may be avoided, in case the stock be so subject to prior lien that no interest would pass by sale.⁶

¹ *Kimmel v. Stoner*, 18 Penn. St. 155.

² *Western v. Bear River & Auburn Co.*, 5 Cal. 186; *Tuttle v. Walton*, 1 Geo. 43; *West Branch Bank v. Armstrong*, 40 Penn. St. 278.

³ *New York & New Haven R. R. Co. v. Schuyler*, 38 Barb. 534; 34 N. Y. 30.

⁴ *Tuttle v. Walton*, 1 Geo. 43; *West Branch Bank v. Armstrong*, 40 Penn. St. 278; *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149.

⁵ *Foster v. Potter*, 37 Mo. 525.

⁶ *Weaver v. Huntingdon, etc., R. R. Co.*, 50 Penn. St. 314. In this case the court say: "If the defendant, therefore, held the stock in his own name, the plaintiff may proceed by *fieri facias* and sale under the act of 1819, or by an attachment under the act of 1836. There is a reason why the attachment is an appropriate proceeding under the act of 1836, not noticed by the judge whose opinion was adopted in *Lex v. Patten*. There are cases where the stock is held by the party in his own name, and where there is no owner to make claim, but where it is subject to a charge or lien upon the title. This is the case in all bank stocks under the laws of this State, the stocks being liable to a lien in favor of the bank for debts due to it by the stockholder. In such

§ 1341. A description of the shares, on execution sale, by their numbers, is sufficient, in connection with the owner's name,¹ and the actual possession, or surrender of the certificates, is not necessary as regards the validity of sale or transfer.² The certificates are but the evidence of title, as we have seen in the first part of the present chapter.

§ 1342. In Alabama, stocks are subject to execution sale by attachment and proceedings in equity, under the statute.

§ 1343. And so, in Michigan, it is held that capital stocks are liable by statute, but only by statute, to execution sale; and, moreover, to render the sale valid, the statute must be strictly conformed to in every respect, as the sale can be made, in such cases, only under the statutory power, and not under the general laws in relation to ordinary execution sales.⁴ That a part of the capital stock can only be subjected to sale by proceedings in equity;⁵ and that in selling on execution at law, the sale is to be made to the bidder who for the shortest period of time will pay the amount of the debt and cost, and only for such time.⁶

§ 1344. Under the statute, in Connecticut, capital stocks in private corporations are liable to levy and sale upon execution.⁷ And this liability exists as well against an equitable ownership thereof as against a legal ownership. Hence, stocks pledged as collateral security for a debt, may be levied on, and the equity of the debtor who pledges them be sold at execution sale,⁸ the same as may an equity of redemption in real property. They are incapable of being valued and set off, and, therefore, are rendered liable to sale by statute.

§ 1345. When thus sold under the statute of Connecticut, some instrument in writing is required to be given to the purchaser by the officer selling the stock upon execution sale; and

cases it is important to the rights of the parties and to save litigation that the proceedings by attachment should be resorted to, and the precise extent and character of the claim of the corporation ascertained before final execution."⁹

¹ Stamford Bank *v.* Ferris, 17 Conn. 259.

² New York & New Haven R. R. Co. *v.* Schuyler, 38 Barb. 534.

³ Bank of St. Marys *v.* St. John, 25 Ala. 566.

⁴ James *v.* Pontiac & Groveland Plankroad Co., 8 Mich. 91.

⁵ Ibid.

⁶ Ibid. 94, 95.

⁷ Middletown Savings Bank *v.* Jarvis, 33 Conn. 372.

⁸ Ibid.

such evidence is necessary to sustain the right and title of the purchaser in judicial proceedings.¹

The officer's return is not in itself sufficient to maintain such right of the purchaser.²

§ 1346. And so by statute, in Pennsylvania, the franchise itself and property of the company may be sold. By act of Assembly of April 7th, 1870, the previous process of sequestration enforced against delinquent but solvent corporation judgment debtors, on the return of a *fieri facias* unsatisfied, was altered, and the practice now is on such return of that writ, to seize and sell the franchise and property of the corporation.³ In such proceeding, the proceeds of sale are equally distributed and applied among creditors in the same manner as are by law distributed the assets of insolvent persons or companies.⁴

Thus it is that in Pennsylvania the property of solvent railroad corporations (as also other corporations) are by statute subject to execution levy and sale.⁵ Insolvent ones are proceeded against by sequestration.⁶ Such is the law as to all property held strictly for corporate purposes. Property not held for corporate use, is, like property of others, subject to levy and sale in the ordinary way.⁷

§ 1347. An execution sale of such property as is held for corporate purposes, made subject to the conditions that the company shall keep and retain its railway tracks over the same, carries merely the bare title of the company to the land, subject to the servitude of their road and rights as a company, and nothing more.⁸

§ 1348. A railroad corporation or other corporation established by law, in Pennsylvania, can not, even under the statute, be interrupted in the exercise of its corporate franchise by execution levy and sale, at the suit of a private creditor.⁹ Equity will

¹ Morgan *v.* The Thames Bank, 14 Conn. 98.

² Ibid.

³ Philadelphia & B. C. R. R. Co.'s Appeal, 70 Penn. St. 355; Bayard's Appeal, 72 Penn. St. 453.

⁴ Same cases as cited above.

⁵ Oakland R. R. Co. *v.* Keenan, 56 Penn. St. 198; Reed *v.* Penrose, 36 Penn. St. 214, 240.

⁶ Oakland R. R. Co. *v.* Keenan, 56 Penn. St. 198.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid. 203.

restrain such a proceeding.¹ It can only be put out of existence or stripped of that which is essential to its existence and public servitude, by the public authority, and not by a private suitor.²

III. EFFECT OF SALE.

§ 1349. Under the statute, in Massachusetts, the execution sale of a corporate franchise does not confer corporate capacity on the purchaser; it confers or passes "the franchise with all the rights and privileges thereof, so far as relates to the receiving of toll," and nothing more. The corporate capacity of the company still continues as if no sale were made.³

After such sale, proceedings for forfeiture of the charter, on the part of the State, are against the corporation and not against the purchaser; he is not even necessary as a party.⁴

§ 1350. Though ordinarily the sheriff's return of execution sale is not indispensable to the validity thereof, yet where a sale of stocks is made on execution for merely a nominal consideration, when compared with their real value, and there is no return of such sale showing advertisement or other particulars thereof, or of the sale itself, it will be set aside on motion of the party in interest. More especially so when other circumstances exist unfavorable to the fairness of the sale.⁵

In the case of *State Bank of Missouri v. Tutt*,⁶ the Supreme Court of that State say: "The chief ground relied on is the irregularity of the sale—that it was made without advertisement, or notice, according to law;" that there was evidence "tending to show some management to get possession of the bank stock at less than its value;" that stocks worth eighty cents sold for twelve cents; and the only evidence of sale "is a mere inference of a memorandum or calculation of what was made by some sale."

§ 1351. The judicial sale of the property and franchises of a railroad corporation under a mortgage decree of foreclosure and sale, ordinarily, cuts off all the rights of the debtor corporation

¹ *Oakland R. R. Co. v. Keenan*, 56 Penn. St. 198.

² *Ibid.*

³ *Commonwealth v. Tenth Mass. Turnpike Co.*, 5 *Cush.* 509.

⁴ *Ibid.*

⁵ *State Bank of Missouri v. Tutt*, 44 Mo. 367.

⁶ 44 Mo. 367.

or mortgageor;¹ and a reorganization of the purchasers into a corporate body will be a new and distinct corporation, which is in no wise liable in law for the debts or liabilities of the original company.² Any such liability must grow out of some actual agreement, and will not result from mere force of law.³ But by agreement, the unsecured creditors and stockholders of the old company may become stockholders in the new company, if the bondholders consent to sell on such terms, and no one be postponed and injured thereby.⁴ Not however to the exclusion of any stockholder or creditor.

§ 1352. Execution purchasers of capital stock of a corporation, can enforce a transfer thereof on the books of the corporation, although a by-law thereof exists preventing execution or other sale of the stock while the owner is indebted to the bank, and notwithstanding such indebtedness to the bank, if the making of the by-law occurred subsequent to the issuing of the stock.⁵

It is said that no by-law can be made by the corporation inhibiting the execution sale of a stockholder's stock. But, *quære?* Where the debtor participates in the making of the by-law, if it does not amount to at least an equitable lien thereon?⁶

§ 1353. But a purchaser of capital stock at execution sale, who buys with notice that the debtor has sold the stock, takes nothing by the purchase, as against the purchaser of the debtor, although no transfer of the stock has been made upon the books of the company;⁷ such transfer is necessary to bind the company, but as between others is valid, except as against purchasers without notice.⁸

¹ Smith *v.* Chicago & Northwestern R. R. Co., 18 Wis. 17, 22.

² Ibid.; Vilas *v.* The Milwaukee & Prairie du Chien R. R. Co., 17 Wis. 497; Edwards *v.* City of Janesville, 14 Wis. 26.

³ Smith *v.* The Chicago & Northwestern R. R. Co., 18 Wis. 17.

⁴ Ibid.

⁵ Bryan *v.* Carter, 22 La. Ann. 98.

⁶ Ibid.

⁷ People *v.* Elmore, 35 Cal. 653.

⁸ Ibid.; Weston *v.* Bear River & Auburn Co., 5 Cal. 186; Same Case, 6 Cal. 425; Naglee *v.* Pacific Wharf Co., 20 Cal. 529.

CHAPTER XXI.

EXEMPTION FROM EXECUTION SALE.

- I. THE POLICY OF THE LAW.
- II. ITS LEGAL EFFECT.
- III. WAIVER THEREOF.

I. THE POLICY OF THE LAW.

§ 1354. It is the humane policy of the law, in most, if not all the States, to exempt certain property, real and personal, from execution sale.

§ 1355. This policy is the result of a duty due both to the citizen and to the State, as the prosperity of the latter is dependent on the security and prosperity of the people. Moreover, it is regarded as a protection due to the unfortunate and to the helpless.¹ It rests on those same principles of benevolence which prohibit imprisonment for debt, and of selling one's self into slavery; the principles of humanity and the welfare of the State.

§ 1356. The exemption exists, whether the liability be contracted in the State or out of the State where the judgment is taken. The law of the *forum* or tribunal where the judgment is rendered as it existed at the date of the contract or act of liability, if the same occurred within the State, governs the case. But if the liability occurred in a different State, then the law of the *forum*, as existing at date of judgment, governs,² and is to be favorably construed toward the debtor claiming exemption in either case.³

¹ *Woodward v. Murray*, 18 Johns. 400; *Kneetle v. Newcomb*, 22 N. Y. 249; *Meyer v. Meyer*, 23 Iowa, 359; *Conklin v. Foster*, 57 Ill. 104.

² *Laing v. Cunningham*, 17 Iowa, 510; *Newell v. Hayden*, 8 Iowa, 140; *Helfenstein v. Cave*, 3 Iowa, 287.

³ *Tillotson v. Wolcott*, 48 N. Y. 188; *Heath v. Keyes*, 35 Wis. 668; *Kuntz v. Kinney*, 33 Wis. 510; *Connaughton v. Sands*, 32 Wis. 387; *Winfrey v. Zimmerman*, 8 Bush, 587; *Crane v. Waggoner*, 33 Ind. 83; *Rogers v. Ferguson*, 32 Tex. 533; *Cobb v. Coleman*, 14 Tex. 595; *Nichols v. Claiborne*, 39 Tex. 363; *Montague v. Richardson*, 24 Conn. 337.

§ 1357. Though the judgment and writ of execution thereon be joint, against two defendants, yet if a levy thereof be made upon the individual property of one of the defendants, he is entitled to the benefit of the exemption law the same as if the writ was against himself alone.¹ Otherwise, however, if the execution, being *joint*, be levied upon the *joint* effects, or property of the execution debtors.²

§ 1358. Ordinarily it is the husband, father, or mother who has charge of and provides for the wants of those living with them and constituting the family, and for whom, by the claims of kindred, and the obligations of the law, or of society, they are bound to provide; but sometimes the child or brother assumes those obligations, and very properly so, toward a widowed mother and dependent children, and who, in legal contemplation, in so doing, becomes the head of the family, and is in such cases to be deemed "the debtor," who is entitled to the exemption, and those dependent brothers, sisters and mother are his family, within the meaning and intent of the exemption law.³

§ 1359. The Constitution of South Carolina declares that the family homestead of the head of each family, to an extent defined, shall be exempt from attachment, levy or sale on *mesne* or final process. No definition of the term family is therein given. The term is therefore to be taken in the ordinary sense.⁴ It is held by the courts of that State that it is not necessary to the right of a homestead exemption, under said constitutional provision, that the person claiming it should have children as constituting a part of the family;⁵ and to be entitled to the benefit of

¹ Spade *v.* Bruner, 72 Penn. St. 57.

² Bonsall *v.* Comly, 44 Penn. St. 442.

³ Connaughton *v.* Sands, 32 Wis. 387, 392; Bowne *v.* Witt, 19 Wend. 475; Seaton *v.* Marshall, 6 Bush, 429; Crane *v.* Waggoner, 33 Ind. 83; McMurray *v.* Shuck, 6 Bush, 111. (But in Kentucky it is held not to be the object of the exemption law, as to provisions for the family, to thus include servants. *Ibid.*) Seaton *v.* Marshall, *supra*.

⁴ Bradley *v.* Rodelsperger, 3 Rich. (N. S.) 226; *In re* Kennedy, 2 Id. 216. (In the latter case it is held that the constitutional exemption of the homestead applies as well to debts and judgments existing at the time of the adoption of the Constitution as subsequent; but to our mind this is not sound doctrine. The inhibition of the United States Constitution is that no *State* shall make any law impairing the obligation of contracts, and a constitution is a law of the very highest grade, and can in this case be regarded as varying the obligation of contracts.)

⁵ Bradley *v.* Rodelsperger, *supra*.

the homestead exemption from execution sale, it is not always essential that the person claiming it should be a married person. This will depend upon the statute in each particular State. Under the Statute of Wisconsin, the terms "owner," "resident," and "householder" are used by the statute as descriptive of the persons entitled to its benefit. A single man owning and occupying a house, and having a family occupying it with him, comes within the intent of the law.¹

§ 1360. So, in Texas, exemption acts are liberally construed in favor of debtors; thus, as an instance, the term wagon is decided to cover all four-wheeled vehicles.² And the term *one horse* is construed to include the trapping for use thereof, as bridle and saddle.³ And under the homestead law of that State, a homestead may be established by one of two tenants in common on the lands held in common, and on making partition, equity will so portion the property as to protect the homestead of such party, if it can be done without prejudice to the other.⁴

§ 1361. But under the statute of Minnesota, which exempts as a homestead "a quantity of land not exceeding in amount one lot," etc., it is held that there can not be an exemption of the *undivided half of two lots*.⁵

The reasoning of the court in the case here cited is, that "an undivided half of two entire lots, is not a *quantity* of land not exceeding in amount one lot." The court say: "It is rather an interest or an estate in a quantity of land, exceeding in amount one lot, and therefore" * * * "not covered by the terms of the statute, and is not exempt."⁶ But as the two undivided halves are only equal to one *whole*, we can not see the justness of

¹ Myers v. Ford, 22 Wis. 139.

² Rogers v. Ferguson, 32 Texas, 533.

³ Cobb v. Coleman, 14 Texas, 595; Nichols v. Claiborne, 39 Id. 363. (And so, under the terms tools and instruments necessary for the exercise of the trade or profession by which a debtor gains a living, it is held that commercial books and counting house furniture and the iron chest of a merchant, in which chest his books and papers are kept, are exempt from execution sale. Farmers & Merchants' Bank v. Franklin, 1 La. Ann. 393. And so the instruments of a professional person; for instance, of a dentist. Duperron v. Communy, 6 La. Ann. 789.)

⁴ Williams v. Wethered, 37 Texas, 130; Smith v. Dechaumes, Id. 429.

⁵ Ward v. Huhn, 16 Minn. 159.

⁶ Ibid. 162.

this reasoning, or the liberality of construction with which such statutes ought to be construed.

§ 1362. Homestead, and other exemption statutes, do not apply against the State, unless expressly so stated therein. They are made for applications as between individuals only, and can not be invoked as against the State or the United States.¹

They apply, however, as between individual persons, as well to estates less than a fee, as to those held by full fee simple title. Thus, a tenancy, or leasehold interest for years, a life estate, or other interest in lands, is exempted if a homestead. The design of the law is to protect the home of the debtor.² Such laws are made for the government of the people of a State, and not the State itself, unless expressly applied to the State, as has been above stated.³ There are decisions, however, to the contrary, but they are believed to have been made up on exceptional grounds, rather than upon general and legally recognized principles.

In the case of *Commonwealth v. Cook*, reference was made to *Doe d. Gladney v. Deavors*, 11 Geo. 81, and the same was commented on as being one in which the ruling was in favor of exemption of personal effects, as against the State, although the claim was for taxes; but the Kentucky courts held that no such construction could be put upon the law in Kentucky, and that it therefore was not necessary to express an opinion as to the correctness of the Georgia decision or of the reasoning by which it was arrived at.⁴ The case of *Commonwealth v. Cook* arose out of proceedings upon a sheriff's bond in favor of the State for State revenue. The decision, however, was not put upon the ground of the debt being of that character, but upon general principles equally applicable to all manner of liabilities to the State; for though the court refers to a statute of Kentucky, subjecting *all* the property of defendants in such cases to execution sale in favor of the State, yet such reference is made to negative the idea contended for, that the *exemption* act is to be *applied* to the State by implication, and expressly rules in favor of the State upon general principles.

¹ *Commonwealth v. Cook*, 8 Bush, 220; *United States v. Knight*, 14 Pet. 315; *The State v. Garland*, 7 Ired. L. 50; *Divine v. Harvie*, 7 T. B. Mon. 443.

² *Conklin v. Foster*, 57 Ill. 104.

³ *Bac. Abt. Title Prerogative*, 3, 5.

⁴ *Commonwealth v. Cook*, 8 Bush, 220.

II. ITS LEGAL EFFECT.

§ 1363. The operation of exemption laws is prospective, and applies only to sales on such liabilities and transactions as occur after the enactment thereof, so far as regards domestic transactions. The law in force when the transaction or contract takes place becomes a law of the contract, and when judgment is rendered therein execution sale thereunder is governed by that law.¹

If, however, the judgment is rendered in a different State from that in which the contract or cause of action arose, and that fact is apparent in the record, then the exemption law, if there is one, which is in force at the date of the judgment, and in the State where the judgment is rendered, is the rule of the sale on execution thereon; for the laws of the county where the transaction arose can have no force where the judgment is rendered, and the law of the latter place has no force abroad so as to become a part of the contract. Laws, whether statutory or constitutional, purporting to be in their action retrospective in respect to exemption from execution sale, are, so far as regards contracts and liabilities existing at the date of such laws, inoperative and void, as impairing the obligation of the contract.²

Therefore, in domestic transactions, the law in force at the date of the contract governs the rights of the parties in controversies arising under the homestead exemption. And though the law be thereafter modified or repealed, still it remains as a constituent part of the contract, and such repeal will not impair the rights acquired while the law was in force. In transactions occurring out of the State where sued on, the law of the forum at date of judgment governs as to exemption.

§ 1364. In *Bridgman v. Wilcut*,³ GREENE, Justice, the rule is laid down in the following language by the Supreme Court of Iowa: "The homestead law in force at the date of the contract, having been a part of it, the superseding of that law by the substitution of the new law in the code can not deprive the debtor and his family of the homestead rights; nor could the

¹ Homestead Cases, 22 Gratt. 266; *Bridgman v. Wilcut*, 4 G. Greene, 563, 566; *Tillotson v. Millard*, 7 Minn. 513; *Bronson v. Kinzie*, 1 How. 315.

² Homestead Cases, 22 Gratt. 266; *Tillotson v. Millard*, 7 Minn. 513.

³ 4 G. Greene, 563, 566; *Tillotson v. Millard*, 7 Minn. 513; *Bronson v. Kinzie*, 1 How. 315.

repeal of the homestead law weaken or impair the contracts made, or divest rights acquired while the law was in force. The debtor's right to the homestead was acquired under the law of 1849, and his homestead established while that law was in force, and his petition presents a *prima facie* case, showing his right to the premises as exempt from forced sale under the law."

§ 1365. And so, upon repeal of a homestead law, or modification thereof, a saving clause in the repealing act saves to debtors all rights of homestead which had accrued under the law thus repealed, irrespective of the question above referred to, as to whether, without such saving clause, a repeal of the law may impair or take away the rights of homestead, and the effect of contracts originating while the law was in force.¹ In the case of *Helfenstein v. Cave*, the court hold that such saving clause as effectually protects the homestead from execution sale as would the law if no repealing act had passed.

In the same case the court rule, substantially, that as the exemption right is purely statutory, the debtor, to avail himself thereof, must show the performance of all things on his part required thereby, if any, as necessary to confer or fix the right.²

§ 1366. Under the statute in Iowa, it is held that to constitute a homestead so as to attach to it the privilege of exemption from execution sale, there must be actual occupancy as the dwelling place of the owner, and that a mere intention to so occupy will not impart to the property the legal attributes of a homestead. In the language of WRIGHT, Justice, in the leading case of *Charless v. Lamberson*, "To be the homestead, it must be 'used,' and used for the purpose designed by the law, to-wit: as a home, a place to abide in, a place for the family."³ "A mere intention to occupy, though subsequently carried out, is not sufficient."⁴ And such, say the Iowa Supreme Court, is the unbroken series of decisions in that State.⁵

¹ *Helfenstein v. Cave*, 3 Iowa, 287, 294; *Clark v. Potter*, 13 Gray, 21.

² *Helfenstein v. Cave*, 3 Iowa, 290, 291.

³ *Charless v. Lamberson*, 1 Iowa, 435, 440; *Hale v. Heaslip*, 16 Iowa, 451; *Holden v. Pinney*, 6 Cal. 234; *Benedict v. Bunnell*, 7 Cal. 245; *Wisner v. Farnham*, 2 Mich. 472; *Pryor v. Stone*, 19 Texas, 371; *Horn v. Tufts*, 39 N. H. 478; *True v. Morrill*, 28 Vt. 672.

⁴ *Elston v. Robinson*, 23 Iowa, 208, 211; *Christy v. Dyer*, 14 Iowa 438; *Page v. Ebwbank*, 18 Iowa, 580; *Cole v. Gill*, 14 Iowa, 527; *Williams v. Swetland*, 10 Iowa, 51; *Hyatt v. Spearman*, 20 Iowa, 510; *Campbell v. Ayers*, 18 Iowa, 252.

⁵ *Elston v. Robinson*, 23 Iowa, 211.

§ 1367. But by a more recent decision of the same court this doctrine, as to actual continual residence, is relaxed, when the head of the family is dead. The rule laid down, then, is, that the abandonment of the homestead by the widow, or heirs at law of a deceased owner, does not subject the homestead to sale for payment of the decedent's debts, other than such as it was liable for during his lifetime; but that on his death a possessory title for life vests in the widow, and the fee vests in the heirs at law; and that there is no provision of the statute requiring the actual occupancy by the widow or heirs, as a homestead, in order to protect it from the debts of the estate.¹

§ 1368. In Minnesota, prior to the act of April, 1860, judgments were held to be liens upon homesteads, and though the latter were exempt from sales, so long as occupied as such, it was at the same time held, that if the debtor removed from or sold the same, the homestead thereby became liable to levy and sale on execution.² But by the act of April, 1860, "the owner of a homestead," under the laws of said State, "may remove therefrom, or sell and convey the same, and such removal, or sale and conveyance," will "not render such homestead liable or subject to forced sale on execution or other process." And it is further enacted that no judgment or decree of any court should thereafter be a lien on the homestead of the debtor for any purpose whatever.³

In the case of *Folsom v. Carli*,⁴ the court say: "We hold that under the exemption law, as it existed at the time this judgment was rendered and docketed, and the property sold, the lien of the judgment attached to the homestead as well as to any other real property of the judgment debtor. That the exemption of the homestead was only an exemption from sale on execution, while occupied by the debtor or his family, but did not affect the lien of the judgment. That when McKusick, the judgment debtor, abandoned the property as a residence, and conveyed it to another, the exemption ceased, and the judgment creditor had then the right to enforce his lien by a sale of the

¹ *Johnson v. Gaylord*, 41 Iowa, 362.

² *Tillotson v. Millard*, 7 Minn. 513, 520; *Folsom v. Carli*, 5 Id. 333.

³ *Tillotson v. Millard*, *supra*.

⁴ 5 Minn. 333, 338. Such, too, is the ruling in Mississippi. *Whetworth v. Lyons*, 39 Miss. 467.

premises on execution, and that the grantee, Carli, took the property subject to the lien of the judgment."

§ 1369. In Iowa, the ruling is to the converse of this, and it is there held, under the statute, that the owner may change his homestead from time to time, at pleasure, and may sell and reinvest, without liability to execution.¹ And so, likewise, in regard to exempted personal property.²

§ 1370. In the case of *Lamb v. Shays*,³ the court hold that although judgments are ordinarily liens against the real estate of a debtor, yet they are not so as against the homestead, and that the debtor may sell and convey the homestead at pleasure and the estate will vest in the grantee, if so sold and conveyed while occupied and used as a homestead. The court holds, substantially, that a judgment lien is only co-extensive with the power to enforce it by sale, and that if the sale is prohibited the lien is a dead letter.⁴ The court say, "the right of exemption continues until the sale and delivery of the deed to the vendee, and the lien can not attach until the sale and delivery, nor until after it ceases to be occupied by the owner;" and that, "prior to this, the vendee's rights become absolute." In the same case the court justly remark, that "if the lien of a judgment confessed by, or taken against, the husband alone, (and to which the wife never assented,) can attach to, and subject the homestead to the payment of his debts, it virtually destroys that peculiar interest of the wife in the homestead which the Legislature seems to have been so strenuous to protect."⁵

§ 1371. It is a principle of law that what a person can not do directly he can not be allowed to do indirectly. From this it results that, as the owner can not, by prior contract in the creation of a debt, waive the exemption by direct agreement, he may not bring about a waiver by submitting to a judgment, and thereby create a lien which will operate as such waiver.

But by the ruling in the same case, *Lamb v. Shays*, if the property ceases to be occupied and used as a homestead, the lien

¹ *Pearson v. Minturn*, 18 Iowa, 36; *Lamb v. Shays*, 14 Iowa, 567.

² *Bevan v. Hayden*, 13 Iowa, 122.

³ 14 Iowa, 567, 570; *Cummings v. Long*, 16 Iowa, 41.

⁴ Such, too, is the ruling by Chief Justice MARSHALL in *Scriba v. Deanes*, 1 Brock. 166; *Bank U. S. v. Winston*, 2 Brock. 252; and by Justice MCLEAN, in *Shrew v. Jones*, 2 McLean, 78.

⁵ *Lamb v. Shays*, 14 Iowa, 571.

of the judgment then attaches thereto and it becomes liable to execution sale, as other realty. The language of the court is that "the moment it ceases to be used as such, the lien attaches, the same as it attaches against property acquired by the judgment debtor after the judgment is rendered, and the priority of liens can be determined in the same manner."¹

§ 1372. However liable the homestead may be to execution sale for debts contracted prior to its occupancy as such, yet, ordinarily, the creditor will be compelled, if required at the time so to do, to exhaust all other property liable to execution before resorting to the homestead.²

§ 1373. In *Barker v. Rollins*,³ it is held that the provision of the Revision, Sec. 2281, that the homestead, when liable, shall not be "sold except to supply the deficiency remaining after exhausting the other property of the debtor which is liable to execution," applies only to the homestead while it remains the property of the debtor for whose debt it is sought to be sold, and not to the homestead property after it is transferred by conveyance to another party. The Supreme Court, COLE, Justice, after reciting the provision above referred to, say: "The difficulty with defendant Coghill is, that he is not the debtor, and is not within the language or the spirit of the section quoted. His homestead was not within the contemplation of the parties to the contract sued on. The creditor will be held to have contracted with reference to all the phases of homestead claimed by his debtor; but not as to any such claim by parties who should voluntarily purchase the property with full knowledge of the incumbrance upon it." The case above cited was brought to foreclose a mortgage, to which the homestead was justly liable, in the hands of the mortgage debtor, but only so, under the statute, after the exhaustion of the debtor's other property subject to execution. The property was sold by the mortgage debtor to Coghill, who was made a co-defendant in the foreclosure proceeding. He relied on the statutory privilege above referred to as a protection and defense until the debtor's other property should be exhausted. Thus the question arose which elicited the decision that the privilege of exemption does not in

¹ Lamb *v.* Shays, 14 Iowa, 570.

² Dengre *v.* Haun, 13 Iowa, 240.

³ 30 Iowa, 412.

such cases inure to the purchaser of the mortgaged premises. The homestead, that is the homestead of the debtor, is not to be sold until his other property, subject to execution sale, is applied by sale to the discharge of the debt; then only for the balance. But the court hold that, having been transferred and being no longer the debtor's homestead, it is no longer entitled to be exempted under the statute.

§ 1374. In *Tillotson v. Millard*,¹ it is held that the act of April 30th, 1860, though valid as to transactions occurring after it took effect, is unconstitutional and void as to contracts and judgments anterior thereto in date; that its operation is prospective only, and that it applies to such judgments and contracts as are subsequent thereto in date, and not to those existing at the time of its enactment.

§ 1375. Thus, in Virginia, the ruling is, that homestead exemptions, whether created by constitutional provisions or by statutory enactments, only operate prospectively and as against debts thereafter contracted. Hence both the constitution of Virginia and the statutory enactments of that State exempting homesteads as against "any debt heretofore or hereafter contracted," are in conflict with the Constitution of the United States, as impairing the obligation of contracts, so far as they purport to operate on debts contracted prior to the taking effect of such constitution and statute.² The provision of the United States Constitution is, that "no *State* shall make any law impairing the obligation of contracts." The objection is the same whether it be a law by the constitution or by statute of the State.

§ 1376. Under the Kentucky homestead act of February 10th, 1866, the exemption applies only as to *liabilities*, or debts, incurred, or created, after June 1st, 1866, and covers the homestead not exceeding in value one thousand dollars. Where the judgment, execution and levy, were all subsequent in point of time to that date, but the action was commenced prior to the 1st of June, 1866, the suit being upon a disputed liability for the value of property alleged to have been taken by defendant, the court held the homestead liable for that, the right of recovery related back to the commencement of suit, as there could have been no recovery in the action except on a liability existing when the

¹ 7 Minn. 513.

² The Homestead Cases, 22 Gratt. 266.

suit was brought, and therefore, that the homestead was liable; and that the costs, though accruing, in part, after the act took effect, being only incident to the liability or debt itself, attached thereto and were governed by the law as applicable to the liability itself.¹ And if the liability is for a tort, then it is incurred at the time of committing the act or tort complained of, and for which the recovery is had, and the question of exemption refers itself back to that date.²

Nor will the *novation*, or renewal of a moneyed obligation, as for instance the making of a new note, for and in lieu of an old one, bring the new liability within the benefit of the exemption law, if it were not so, under the old one. The giving of a new note for an old debt, does not create a new debt, and the rights of the parties therein as to the homestead exemption, *relate* back to the date of the original indebtedness, unless otherwise agreed.³

§ 1377. In the case of *Kelly v. Baker*,⁴ the Supreme Court of Minnesota hold, that when the homestead is confined to the proper quantity or value required or limited by law, and is actually occupied by the dwelling-house and residence of the party, he can subject such parts thereof as are not covered by his dwelling-house "to any use which he" may "choose," without rendering any part of it liable to execution sale.

§ 1378. In Iowa the ruling is so far the converse of this, that where the occupant of a three-story house and half lot, used and held as a homestead, underlet the lower story and cellar to be used as a store, the Supreme Court held, (STOCKTON, Justice, dissenting,) that the part so underlet was liable to execution sale.⁵ But we would not be understood as assenting to the correctness of this decision; nor do we apprehend that it will be approved of and followed by subsequent rulings, should like cases hereafter occur. We rather regard the dissenting opinion of Justice STOCKTON as the more sound, though not the more authoritative opinion.

§ 1379. Yet the ruling in Michigan is as in the Iowa case above cited. There, the owner of a city lot built thereon a

¹ *Knight v. Whitman*, 6 Bush, 51; *Kibbey v. Jones*, 7 Bush, 243.

² *Slater v. Sherman*, 5 Bush, 206; *Knight v. Whitman*, 6 Bush, 51, 53.

³ *Kibbey v. Jones*, 7 Bush, 243.

⁴ 10 Minn. 154, 157.

⁵ *Rhodes v. McCormick*, 4 Iowa, 368.

double house, suitable for the occupancy of two families. He occupied one-half himself, renting out the other. The ruling was that the one so let to another person was liable to levy and sale on execution against the owner. The decision, however, assumes to be based upon the intent of the debtor, that the part so rented was erected for renting purposes and not as a home-stead; and the court say, that the use of the adjoining yard *in common* by both landlord and tenant, does not alter the case as to liability to execution.¹

§ 1380. In Ohio, by the act of April, 1857, it is provided that "no married man shall sell, dispose of, or in any manner part with, any personal property, which is now or may hereafter be, exempt from sale on execution, without having first obtained the consent of his wife thereto." And that, "If any married man shall violate the provisions of the foregoing section, his wife may, in her own name, commence and prosecute to final judgment and execution a civil action for the recovery of such property or its value in money." It is held, by the Supreme Court of that State, that under this statute, where the husband, without the concurrence of the wife, mortgaged property otherwise exempt from execution, and the same was, after breach of the mortgage, sold on execution emanating from a judgment for the mortgage debt, the wife could maintain her action for the property thus sold. This, too, although the proceedings were not by foreclosure of the mortgage, but by an action and judgment at law for the mortgage debt; for the execution of the mortgage was held to be a disposal of the property which estopped the husband from claiming the benefit of exemption.²

§ 1381. In Iowa it is held that a threshing machine, used by the farmer for threshing his own grain, and for threshing the grain of others for hire, does not come within the meaning of the statute which exempts from execution sale "the proper tools or implements of a farmer." The Supreme Court of that State say, DILLON, Justice: "We are of opinion that" it is "intended to exempt only the ordinary and usual tools of husbandry, and" does "not extend to a threshing machine owned by a farmer, to thresh his own grain, and that of others for hire;" that the "law makes no extravagant exemptions. It is intended for the

¹ Dyson *v.* Sheley, 11 Mich. 527.

² Colwell *v.* Carper, 15 Ohio St. 279.

poor, rather than the rich. Its design is to enable the debtor and his family to live, by shielding from the creditor the ordinary and usual means of acquiring a livelihood."¹

§ 1382. In Wisconsin, State exemption laws have been held to apply to process of execution in the hands of the United States Marshal, issued on a judgment in a court of the United States;² and that property exempt by law is not in legal custody when taken by a United States Marshal and held on execution issued from a Federal court; that, therefore, an action of replevin will lie in a State court, at the suit of the execution debtor, against such officer to recover the property so taken and held by him. But however correct the former part of this decision is, on the supposition that the process and "proceedings thereon" of the State courts have been adopted by Congress or by order of the United States court, yet the doctrine deduced therefrom, that an action of replevin will lie against the marshal on process from a State court, is unsound.³

§ 1383. As to the application of State exemption laws to process from a United States court in the hands of the marshal, that depends upon the adoption of the State laws, for the particular district, upon that subject. If by rule of court, or by act of Congress, (as, for instance, was done by the act of Congress of May 19th, 1828,) such exemption laws have been adopted a. rules of action governing processes from the United States courts, then they are to be observed and conformed to in all their incidents of forthcoming bonds, appraisement and exemptions, by the United States Marshal, in the execution of process that may come into his hands. But if not so adopted, then he will be governed by the laws of the United States, and the exemption laws of the State will not be observed.⁴

§ 1384. If, however, such exemption laws are adopted, so as to become a rule of action to the marshal in executing the processes of the Federal courts, and he violate those laws by levying

¹ Meyer *v.* Meyer, 23 Iowa, 359, 375.

² Gilman *v.* Williams, 7 Wis. 329.

³ Ibid.

⁴ Freeman *v.* Howe, 24 How. 450, and cases there cited.

⁵ Brightly's Digest of Laws, Vol. I., 268, 269; United States *v.* Knight, 14 Pet. 301; Catherwood *v.* Gapete, 2 Curt. C. C. 94; Binns *v.* Williams, 4 McLean, 580; Ross *v.* Duval, 13 Pet. 45; Amis *v.* Smith, 16 Pet. 303; United States Bank *v.* Halstead, 10 Wheat. 51; Beers *v.* Haughton, 9 Pet. 329, 362; McNutt *v.* Bland, 2 How. 9.

on and taking possession of property exempt from execution sale, or under any other circumstance make a wrongful seizure, yet no action will lie against him in a State court predicated on processes designed to wrest such property out of his possession; for his levy and possession places the property in the custody of the court, and no other court can disturb such possession.¹ To obtain possession from the marshal, a better claimant, if there be one, should apply by petition to the United States Court from which emanated the process under which the property is held.²

§ 1385. But this rule of law is no bar to a personal action for damages in money, in a different court, against the marshal, for a wrongful levy of property not subject to execution; and therefore trespass or trover may be maintained in such cases.³

§ 1386. It is moreover held that when, by such acts of Congress or order of court, the State process and forms are adopted in regard to final execution, that such adoption carries with it the attendant legal attributes, incidents and inhibitions that under the State laws apply to like final process from the State court; and as a consequence, the State laws, so far as constitutional, in regard to exemptions from execution sale, and in reference to appraisement before execution sale, will then apply to the execution of like final process in the hands of the United States Marshal, in like manner as if the process was from the State court, and being executed by the sheriff, whether the same be expressly adopted or not;⁴ with this difference, however, that if the appraisers summoned by the marshal fail to attend and discharge their duties, then the marshal may sell without appraisement, as hereinbefore stated.

§ 1387. Under the statute in Missouri, personal property, to a certain amount in value is entitled to be exempt from execution sale, and the debtor, in case of levy, has a right to select the property. Under this statute it is the duty of the officer levying an execution on personal effects, to notify or inform the execution debtor of his right to make the selection. The omission of the officer so to do, and more especially refusal on his part to allow

¹ *Freeman v. Howe*, 24 How. 450; *Taylor v. Carryl*, 20 How. 583; *Hagan v. Lucas*, 10 Pet. 400.

² *Buck v. Colbath*, 3 Wall. 324, 345; *Freeman v. Howe*, *supra*.

³ *Buck v. Colbath*, *supra*.

⁴ *United States v. Knight*, 14 Pet. 301; *Same Case*, 3 Sumn. 358; *Amis v. Smith*, 16 Pet. 303.

the debtor the privilege thus given by the law, is an oppression and wrong for which an action may be maintained.¹

§ 1388. And it may be regarded, as a general principle, that the levy and sale of realty, or the simple levy of personal property, which is by law so particularized as exempt from execution sale as to enable the officer to know that fact, or as comes within the selection allowed by law to the debtor, and after such selection and notice thereof to the officer, he so proceeds, in disregard of the law and the debtor's rights, will subject the officer to an action at the suit of the execution debtor.²

§ 1389. The term lands, as used in the statute of Mississippi exempting property from execution sales, includes not only the fee, but also every lesser interest, as tenancies for years, or for life.³

§ 1390. As against liens for the purchase money, and other liens of any kind anterior in date to the homestead acquisition, there is no homestead in favor of either the husband or wife, except as subject to those liens.⁴

§ 1391. Land held under the Homestead Act of the Congress of the United States is, by the terms of the act, exempt from execution sale for any debt or debts contracted prior to the issuing the patent therefor, and therefore the sale of such lands on execution for such debts, if attempted, will be enjoined, upon the application of the debtor.⁵ Congress has full power to dispose of the public lands in such manner, and upon such terms, conditions and restrictions as in their judgment will best subserve the public welfare.⁶

§ 1392. In questions involving the homestead exemption under the *local* law of California or statute of that State, it must not only be shown that the statute has been complied with in regard to filing the declaration claiming it as such, and describing the land, but also there must be made to appear a use, dedication, or appropriation of the land in point of fact, as a home of the family; and if only a part be in fact used as such, then the remainder not

¹ *State v. Romer*, 44 Mo. 99.

² *Buck v. Colbath*, 3 Wall. 384, 345; *State v. Romer*, 44 Mo. 99; *Spencer v. Long*, 39 Cal. 700.

³ *Johnson v. Richardson*, 33 Miss. 462.

⁴ *Hopper v. Parkinson*, 5 Nev. 233.

⁵ *Miller v. Little*, 47 Cal. 348.

⁶ *Ibid.*

so used and appropriated, though part of the tract claimed as a homestead, is no part of the homestead, within the meaning or sense of the statute, and such remaining part is not exempt from execution sale, by virtue of the State law.¹

§ 1393. In Illinois judgments are not liens upon homestead.² The exemption is of the fee, and not merely of the right of homestead or occupancy.³ If a mortgage conveyance of the homestead lands be made by both the husband and wife, and yet the right of homestead or occupancy as such is not expressly waived and subjected by the mortgage conveyance; it remains with the grantors, and is only lost by actual abandonment thereof.

The exemption attaches, though the value be over one thousand dollars, which is the homestead allowed by law, as against the validity of any execution made without the officer having taken the prior steps required by law to set off the homestead.

§ 1394. The officer levying may proceed to have the same set off, where the lands levied include the homestead, and are of greater value than the one thousand dollars.⁴

The manner of setting off the same in such cases, and ascertaining the value, is by six sworn householders of the county appraising the same upon their oaths, and designating in their return to the sheriff the property set off, which procedure is evidenced also by the return of the sheriff. When the homestead is so set off to include the home of the debtor, the residue of the lands, as far as required to satisfy the writ, may be legally sold.⁵

§ 1395. And so in sales in chancery or judicial sales, the law having made no special provision for the manner of setting off the homestead, when included in the property to be sold, the court will in that respect conform to the method of setting the same off by officers holding writs of execution, and will so direct in the decree. In carrying out the decree in that respect, the commissioner acts as the officer of the court, and need not con-

¹ Gregg *v.* Bostwick, 33 Cal. 220; Mann *v.* Rogers, 35 Cal. 316, 319.

² Hartwell *v.* McDonald, 69 Ill. 293.

³ Ibid.; Smith *v.* Miller, 31 Ill. 158; Green *v.* Marks, 25 Ill. 221; Fishback *v.* Lane, 36 Ill. 437; Conklin *v.* Foster, 57 Ill. 105; Hoskins *v.* Litchfield, 31 Ill. 139; Wing *v.* Cropper, 35 Ill. 256; Blue *v.* Blue, 88 Ill. 9.

⁴ Newman *v.* Willitts, 78 Ill. 397.

⁵ Ibid.

sult the debtor in respect to the discharge of his duties.¹ The master or commissioner acts as the officer of the court, and subject in all things to its supervision, approval, or rejection, and his duty is to select men of integrity and good judgment.² And in the enforcement of liens against lands including the homestead, the court may, if the homestead right is not waived or released, set off the homestead, and decree a sale of the balance of the premises.³

But the homestead is protected under the laws of Illinois only as against creditors, and not in behalf of the widow of a deceased *in addition* to her dower, as against the heirs at law.⁴

Yet the husband can not defeat or cut off the wife's right in the homestead by any contract or act of his alone; therefore, if he *consent* to a decree to that effect, it will be no bar to the wife in setting up her homestead right in equity. The law favors the homestead rights of the wife as against the acts of the husband.⁵

§ 1396. And although, under the Illinois statute, there is exempt a homestead lot and buildings not exceeding in value the sum of one thousand dollars from execution levy and sale, the same is also necessarily exempted to the same extent in value from judgment liens, and the debtor may sell the same.⁶ Yet the lien of a judgment will attach to so much of the property as is in excess in value of the one thousand dollars. The excess may be ascertained and subjected to sale in the manner provided for by statute; that is, by appraisal of a jury summoned by the officer, and by setting apart and selling the excess, if capable of division. And if not susceptible of division, then to be sold and equitably adjusted under the statute.⁷

§ 1397. The improper sale of the homestead under an execution is no ground for setting aside the sale of other lots connected therewith, where the lots were sold separately, and the homestead lot, or the one on which the dwelling house is situated, is worth the amount of the one thousand dollars, or such other sum

¹ Cummings *v.* Burleson, 78 Ill. 281.

² Ibid.

³ Ibid.

⁴ Eggleston *v.* Eggleston, 72 Ill. 24; Sontag *v.* Schmisseur, 76 Ill. 541.

⁵ Allen *v.* Hawley, 66 Ill. 164.

⁶ Haworth *v.* Travis, 67 Ill. 301; Green *v.* Marks, 25 Ill. 221; Bliss *v.* Clark, 39 Ill. 590.

⁷ Smith *v.* Miller, 31 Ill. 157.

expressed in the homestead allowed to debtors as exempt from execution sale. In such case the court, on bill filed to set aside the entire sale, will set aside the sale of the homestead lot only, and without disturbing the sale of the other lots, if justice can thereby be fully subserved.¹

§ 1398. In Illinois, the homestead exemption is for the benefit of the family, and continues after the death of the husband, until the youngest child is twenty-one years of age, and also until the death of the wife, and no release, sale, or incumbrance is valid unless executed by the householder and his wife, nor even then as against the rest of the family while occupied by them.² Subject to such occupancy they may sell, but the purchaser will only be entitled to enter and have the possession after abandonment by the family, or the expiration of the homestead privilege by the death of the parents and arrival of the children at the age prescribed by the statute.³

Subject to the same limitations and uses of the family, it is held to be subject to execution sale; but the purchaser takes merely the reversion, without the right of entry, until it shall cease, as above stated, to be used as a homestead. After that time he is invested with the full estate.⁴

§ 1399. By the laws of Missouri, property and wages, which are otherwise exempt from liability for debt, become subject to attachment whenever the debtor "is about to remove out of" the State, "with intent to change his domicile." In such case, "all that he possesses is liable to attachment."⁵

§ 1400. The same right of exemption in an execution debtor exists in regard to property reached by an officer by process of garnishee, as exists in property taken by such officer by levy out of the actual possession of the execution debtor. There is no exception or reason for an exception in this respect. It is but a different method than the ordinary one of reaching the property of a debtor on execution or writ of attachment, and the rights of the debtor are the same in either case.⁶ And money in bank

¹ Linton *v.* Quimby, 57 Ill. 271.

² Black *v.* Curran, 14 Wall. 463.

³ Ibid.; McDonald *v.* Crandall, 43 Ill. 231; Coe *v.* Smith, 47 Ill. 225. And if twice conveyed, the older conveyance holds. Ibid. Hewitt *v.* Templeton, 48 Ill. 367.

⁴ Black *v.* Curran, 14 Wall. 463.

⁵ State *v.* Laies, 46 Mo. 108.

⁶ Fanning *v.* First National Bank of Jacksonville, 76 Ill. 53.

may be claimed successfully as exempt to a less sum than one hundred dollars, when by law the party defendant selects the same under a statute allowing him to select what particular property to that amount shall be exempt.¹

§ 1401. The statutory exemption of a debtor's earning for personal services extends as well to the earnings of professional persons earned in their profession as to the earnings of ordinary laborers.²

By the statute of Iowa, the earning of a married debtor or head of a family, for his personal services, or the services of his family, rendered within ninety days last before the levy or service of garnishee, are exempt from execution and attachment.³

The case here cited of *McCoy v. Cornell* was one of replevin. The plaintiff therein being a physician, rendered services to the county. A warrant for the amount of the services was issued in his favor, and not yet being delivered to him, was attached by his creditors by garnisheeing the county auditor. The Supreme Court of Iowa sustained his right to replevy the same, and to hold it free from such attachment levy as exempt from execution and attachment under the statute, it appearing that the indebtedness was for services rendered in his professional capacity within ninety days next preceding the levy of the attachment, and service of garnishee on the proper officer of the county.⁴

It being objected in the action of replevin as against the right of recovery that the debtor, now plaintiff in replevin, had not notified the officer or defendants that the warrant and debt were by him claimed as exempt, the court held that no such notice was necessary.⁵

§ 1402. Such an ownership of property as ordinarily subjects it to levy and sale on execution, is such an ownership as the law regards as protected from execution sale, where the property is within the description and value intended to be exempted by the statute. Therefore, co-partnership property is exempt from levy and sale for debts of the firm to the same extent and under like circumstances as is individual property exempt from levy for the

¹ *Fanning v. First National Bank of Jacksonville*, 76 Ill. 53.

² *McCoy v. Cornell*, 40 Iowa, 457.

³ Revision of 1860, Sec. 3307; Code of 1873, Sec. 3074.

⁴ *McCoy v. Cornell*, *supra*.

⁵ *Ibid.*

individual owner's debts.¹ The leading case cited here was replevin by co-partners for horses and harness of the value exempt by law, and belonging to the co-partners. The property was levied on for their co-partnership debt. Each of the debtors was a householder and had a family to support, and both were teamsters, deriving their support and that of their families from the use of the horses and harness. It was insisted by the plaintiff in execution that the word *person*, in the statute, shows a legislative purpose of conferring the benefit of the act to individual sole owners of property. But the court considered such a view of the law as amounting to a perversion of the statute, and held that the language of the act should be construed in harmony with its *humane* and remedial purpose—to shield the poor and not to strip them; and, therefore, the property was exempt.²

§ 1403. A *piano* of one who is a music teacher, and uses it for that purpose, is exempt from execution sale, under the statute, in Illinois, and if levied on after notice that the exemption is claimed, the officer is liable to an action without the execution debtor showing that there was no other property which was liable, or, if there is such other property, then without first pointing out or offering the same to be levied.³

But if the levy be made with the knowledge of the debtor and without claim of exemption, then, if the debtor has other property, and which is liable, it must be pointed out, or else the levy will remain good.⁴

§ 1404. In Alabama, there is one thousand dollars worth of personality exempted from execution sale; this, too, whether the debtor have a family or not, in case he be a resident of the State. It may be in money or in other personality.⁵ The claim of exemption is timely, if made before payment of the money by the officer over to the plaintiff, and so, also, if made in court in answer to or in the course of garnishee proceedings, or by an

¹ *Stewart v. Brown*, 37 N. Y. 350.

² *Ibid.*

³ *Amend v. Murphy*, 69 Ill. 337.

⁴ *Ibid.*; *Bonnell v. Bowman*, 53 Ill. 460.

⁵ *Webb v. Edwards*, 46 Ala. 17. But as against proceedings to sell the homestead, the claim of exemption should be made before sale. *Bell v. Davis*, 42 Ala. 460; *Simpson v. Simpson*, 30 Ala. 225; *Gresham v. Walker*, 10 Ala. 370.

application in court against the money in the sheriff's hands, for the law of exemption is liberally construed.¹

§ 1405. By the Maryland act of Assembly of 1861, property of an execution defendant to the value of one hundred dollars, is exempt from levy and sale. By the subsequent act of 1870, the benefit of the exemption is restricted to actual residents of the State.²

§ 1406. In the same State, if a levy and sale be made, and the purchase money be paid to the officer, or lands of a defendant, which are incapable of division, be taken, then one hundred dollars of the proceeds goes to the debtor as for his exemption interests. And it is no excuse to the officer in an action against him to recover the same, if the proceeds of lands, that the debtor had in reality no title to or estate in the lands or property so sold by the officer. The officer is estopped to deny such ownership, he having acted on the assumption that the property was the property of the debtor, in making the levy and sale.³ Nor is omission of the debtor to make claim to the money, and the fact that it was therefore distributed to others, any defense to the officer, for it is his duty to distribute the money as the law directs, if he undertakes the responsibility of distributing it at all, instead of returning it into court, where proper guidance might be had; and length of time will not bar his accountability as to the discharge of his official duty in that respect.⁴ And the repeal of the exemption act after sale made, does not cut off the right of the execution debtor to such share of the proceeds any more than it would cut off his right to his share of the lands, if lands in kind had been set off to him as exempt from sale.⁵

§ 1407. In Oregon, the debtor must claim the benefit of the exemption law, either at the time of levy or at least before the sale, and if he does not, the sale will be valid, although it be of such property as the statute purports to exempt from execution.⁶

In North Carolina, as to homestead exemption, the law

¹ *Webb v. Edwards*, 46 Ala. 17, 25; *Ray v. Adams*, 45 Id. 168; *Ross v. Hannah*, 18 Id. 125; *Watson v. Simpson*, 5 Id. 233; *Favers v. Glass*, 22 Id. 621; *Cook v. Baine*, 37 Id. 350; *Nolan v. Wickham*, 9 Id. 169.

² *Bramble v. The State*, 41 Md. 435.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *White v. Thompson*, 3 Ore. 115.

requires the officer, if the debtor does not claim it, to set it off at the expense of the creditor in the writ, which the latter must pay before the officer is bound to complete the execution of the writ.¹

§ 1408. Property exempt by State law from execution does not pass to the assignee in bankruptcy, if the owner be bankrupt. His title and right to the same is not in any manner impaired by his bankruptcy.²

Where a party owning two yoke of work cattle, sells one in good faith, and delivers the same to the purchaser with the understanding that they should remain the vendor's property until paid for, the remaining yoke of cattle belonging to the vendor is exempt from execution where by law one yoke of cattle of a debtor is exempt, and this, too, notwithstanding the limited ownership of the cattle sold yet retained by the debtor.³

§ 1409. Although insurance on real property which is mortgaged for a debt, when the procurement of the insurance is with a view to additional security for the debt, and is intended for the benefit as such security of the mortgagee in case of loss, inures to the benefit of the creditor, yet such is not the effect in regard to mortgages or conveyances made without such understanding as part of the contract. And, therefore, as a title to realty by execution, levy and an extent, can carry no greater interest than is conferred by an ordinary conveyance, it follows that where the buildings, on property set off to an execution creditor by extent in satisfaction of his debt, are destroyed by fire, after title thus vested in the execution creditor, the insurance having been procured in favor of the former owner, the execution debtor, that neither law nor equity will give to the execution creditor, as following his title to the property, the right to the insurance money.⁴ And so, also, by a parity of reasoning, the result would be the same in case the title should pass by execution sale

¹ *Lute v. Riley*, 65 N. C. 20; *Vannoy v. Haymore*, 71 N. C. 128; *Poe v. Hardie*, 65 N. C. 447. The amount allowed as homestead is to the value of one thousand dollars, and not necessarily in contiguous parts. It is no defense to a rule against the sheriff as to the proceeds of a sale thereof, that the premises were not all occupied or claimed as homestead. *Scott v. Walton*, 67 N. C. 109.

² *Wilkinson v. Wait*, 44 Vt. 508; Same Case, 8 Am. Reps. 391.

³ *Ibid.*

⁴ *Plimpton v. The Farmers' Mutual Fire Ins. Co.*, 43 Vt. 497; Same Case, 5 Am. Reps. 297.

instead of by an extent. We have not, however, found any case in point.

§ 1410. Exemptions from execution sale are the creature of statute no less than is the right itself to sell on execution, and where by the terms of the statute, as is the case in Missouri, the exemption ceases when the defendant in execution is about to remove out of the State, with intent to change his domicile, then property otherwise exempt from levy and sale on writs of execution or attachment becomes liable thereto. The protection of the statute then ceases, and all the property of the debtor is liable to levy and sale.¹

§ 1411. In New Hampshire, the right of homestead inures to the wife.² The value which may be thus exempted is five hundred dollars.³

Until it is set off or assigned to her, the right, like that of dower, before assignment, is merely inchoate.⁴ It may be set off or assigned to her either before or after the death of the husband.⁵

If before his death, or afterward, it may be set off by either the Probate or the Supreme Court;⁶ but if the title thereto is a matter of dispute, then the jurisdiction of the Supreme Court is exclusive.⁷ Until the homestead is set off to her, the wife has an inchoate estate in the whole landed estate to the value of the five hundred dollars, or to such proportion that that sum bears to the value of the whole.⁸

When, however, it is set off, either to her in her husband's lifetime as his wife, or to her as widow after his death, it then becomes a perfect estate for life.⁹

The appraisement and procedure of setting it off are conclusive in collateral proceedings.¹⁰

§ 1412. Execution sale of one person's property for the debt of another is void. It is not like sales in England in market

¹ *State v. Laies*, 46 Mo. 108.

² *Tidd v. Quinn*, 52 N. H. 341; *Norris v. Moulton*, 34 N. H. 397.

³ Same cases as above cited.

⁴ *Tidd v. Quinn*, 52 N. H. 341.

⁵ *Ibid.*

⁶ *Norris v. Moulton*, 34 N. H. 397; *Horn v. Tufts*, 39 N. H. 484.

⁷ *Horn v. Tufts*, *supra*.

⁸ *Tidd v. Quinn*, 52 N. H. 341; *Norris v. Moulton*, 34 N. H. 397.

⁹ *Tidd v. Quinn*, *supra*.

¹⁰ *Barney v. Leeds*, 54 N. H. 128.

overt. The doctrine of the latter has never been adopted in these States. Nor is it otherwise a sale, even though there was actual delivery of the property when sold. There is no property by the levy vested in the officer. That is the case on valid levies; but there is no valid levy of one person's property for the debt of another. The writ must run against the owner of the property which is seized and levied. If, by mistake or otherwise, the property of one not a defendant in the writ, is taken and sold for the debt of another, nothing passes by the sale.¹ And if the whole interest of a chattel belonging in common to two persons, for the debt of, and on execution against one of such persons duly, is sold, then only the interest of the execution debtor will pass by the sale.

§ 1413. So, in New Hampshire, execution sale of goods and chattels can only be of such property as the officer can see and handle at the time and place of selling, and can deliver into the possession of the buyer.² If the property be intangible, then it must be such as is capable of identification, and must be so described as to identify it.³ If capital stock, then the sale must be of the number of shares, and describing their numbers, if practicable. It is not sufficient to describe them as all the interest of the debtor, as such stockholder.⁴ But if the property be tangible, and be actually seized, then the sale may be of the debtor's *interest therein*.⁵

§ 1414. The remedy of a creditor in execution against the lands of his execution debtor, so far as the legal title is liable, is in New Hampshire by extent, and not by execution sale. But an equity of redemption in lands, when levied on execution, may, under the act of July 3, 1822, be sold.⁶ If such interest be

¹ Bryant *v.* Whitcher, 52 N. H. 158; Buffum *v.* Deane, 8 CUSH. 35, 41; Champney *v.* Smith, 15 Gray, 512; Johnson *v.* Babcock, 8 Allen, 583; Griffith *v.* Fowler, 18 Vt. 390; Sanborn *v.* Kittredge, 20 Vt. 640; Austin *v.* Tilden, 14 Vt. 327; Ventress *v.* Smith, 10 Pet. 161, 176; Symonds *v.* Hall, 37 Maine, 358; Stone *v.* Ebberly, 1 Bay, 317; Homesley *v.* Hogue, 4 Jones L. 481; Arendale *v.* Morgan, 5 Sneed, 703; Boggs *v.* Fowler, 16 Cal. 559; Warren *v.* Cochran, 80 N. H. 379.

² Jones *v.* Portsmouth & Concord R. R. Co., 32 N. H. 544, 553; True *v.* Congdon, 44 N. H. 56.

³ Jones *v.* Portsmouth & Concord R. R. Co., *supra*.

⁴ Ibid.

⁵ True *v.* Congdon, 44 N. H. 48.

⁶ Kelly *v.* Barnham, 9 N. H. 20; Wendell *v.* The New Hampshire Bank, 9 N. H. 404.

extended, the appraisement must be at the full value of the land, irrespective of the lien from which it is to be redeemed.¹

§ 1415. So in Vermont, the remedy of an execution creditor against the lands of the debtor is by an *extent*. When the officer is ordered to levy execution upon the debtor's lands, he files a copy of the writ in the office wherein land titles are recorded, endorsing on the writ a notice of the fact that he is to levy the same upon real property. This fixes a lien on the realty for the term of five months, so far as the lands are described in such endorsement or certificate. The property is then appraised, and is set off to plaintiff at the appraised value, in satisfaction of so much of the writ. The writ is then returned, with a return of the officer's doings thereon, and is to be recorded in the office of the recorder of deeds and also in the office of the clerk of the court whence it issued; and thenceforth, as against the debtor, these constitute the title to the premises thus set off, in the creditor, his heirs and assigns, subject, for six months, to redemption, during which time the creditor can not enter into possession. Redemption is made by payment of the appraised value and interest.²

§ 1416. In Louisiana, the ruling is, that one taking a mortgage on lands at a time when a law exists allowing homesteads to be acquired, takes subject to the right of the owner of the land to establish a homestead thereon by future residence, although unoccupied by him at the date of the mortgage, thus giving a subsequent homestead priority over a prior mortgage. However contrary to our ideas of the law this may be, yet it is so held in that State.³ The court say, TALIAFERRO, J.: "The law confers the right, and the law existed at the time the mortgage was granted. The defendant accepted the mortgage subject to the contingency that might arise in the future, rendering it necessary for the mortgageor to avail himself of the benefit of the homestead law. The plaintiff has fairly made out his case, entitling him to the exemption in his favor."⁴ The procedure was in the nature of an application by the mortgage debtor, as plaintiff, against the mortgage creditor, for a survey laying off the quantity

¹ Hovey v. Bartlett, 34 N. H. 278.

² Vermont Revision of 1862, p. 364, Sec. 15, et seq.

³ Fuqua v. Chaffee, 26 La. Ann. 148.

⁴ Ibid.

of land allowed by law to be exempted, to include improvements, and for an order exempting the same from the mortgage debt and sale thereon; and the exemption was allowed. But in the same State a homestead is not allowable in an undivided estate of lands held with another or others, in common. The ownership must be sole or entire in the person seeking to establish a homestead.¹

And to enable a widow or orphans to maintain rights of homestead in Louisiana, they must be residents in the State at the time of the decedent's death.²

§ 1417. By the Constitution of Arkansas, landholders are to have the right of selecting a homestead; but the manner of doing it is left for statutory direction. Such statutory provision has been made. Thus, until the selection is made in accordance with the legal provision, the exemption is inoperative.³

An omission to select is construed, in the courts of that State, to be a waiver of the right of exemption; and it is also held that the debtor has power to waive the right.⁴ The manner of making the selection and securing the exemption is, for the party to file in the clerk's office a sworn schedule or description of his desired homestead. Merely claiming exemption to the officer is of no validity.⁵

An unmarried person may have a homestead exemption in Florida; but although it is his privilege, yet he may encumber it if he will, which is not permitted to the heads of families.⁶

Under the old law in Arkansas, prior to the constitutional provision above recited, homestead exemption was only allowed to householders being heads of families.⁷ The privilege is favored in that State as a humane one.⁸ A plea of homestead is good, if true, in defense of an action for realty, when plaintiff claims or makes title under execution sale; but the homestead must have existed at the time of the sale.⁹

¹ *Henderson v. Hoy*, 26 La. Ann. 156.

² *Succession of Norton*, 18 La. Ann. 36.

³ *Norris v. Kidd*, 28 Ark. 485.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Greenwood v. Maddox*, 27 Ark. 648.

⁷ *Ibid.*

⁸ *Ibid.*; *Tumlinson v. Swinney*, 22 Ark. 400; *McKenzie v. Murphy*, 24 Id. 157.

⁹ *Hughes v. Watt*, 26 Ark. 228.

When property is exempt from execution sale, as a homestead, it is, by parity of reasoning, also exempt from levy on a writ of attachment; for the latter can only be made available when followed up by judgment and execution sale.¹

§ 1418. By the constitution of Georgia, it is declared that "each head of a family, or guardian, or trustee of a family of minor children, shall be entitled to a homestead." Under this provision it is held that the question as to what constitutes a family is open for judicial decision and not for legislative definition; and that, therefore, an act of the legislature declaring a single person without more, the head of a family, is unconstitutional and void.²

It is held, however, in that State, that the homestead exemption does not apply to judgments rendered for torts.³ If the property is so situated as not to be susceptible of division, and is of greater value than the law exempts, then it may be sold, and the exemption value will be paid over to the defendant debtor out of the proceeds of the sale, and the residue of the money, to the extent of the debt and costs, will be applied to their extinguishment.⁴

§ 1419. By the statute, and under the rulings of the courts in Missouri, a homestead may be sold by the owner, and the proceeds be re-invested in another homestead, without rendering the newly acquired one liable for prior debts from which the former one was by law exempt; and it is not material to such exemption whether the new one be acquired directly or indirectly from the proceeds of the former one. But it must be derived from the proceeds of the former, unmixed with other means of purchase not acquired by the sale of the homestead, or by sale of property acquired by proceeds of the former homestead. So long, however, as the proceeds of sale of the legitimate homestead are traceable, even though it be by investment and resale, unmixed with other means of the debtor, a homestead obtained by means thereof is free from liability to the same extent that the original one was, or would have been, if still retained and occupied as a homestead by the debtor.⁵

¹ Grubbs *v.* Ellyson, 23 Ark. 287; Tumlinson *v.* Swinney, 23 Id. 400.

² Calhoun *v.* McLendon, 42 Geo. 405; Lynch *v.* Pace, 40 Id. 173.

³ Davis *v.* Henson, 29 Geo. 345.

⁴ Dearing *v.* Thomas, 25 Geo. 223; Moultrie *v.* Elrod, 23 Id. 393.

⁵ Farra *v.* Quigly, 57 Mo. 284; Wagner's Statutes, 698, Secs. 7, 8, 9, 10. But

And so the money recovered by a debtor in an action for levy and sale of exempted property is likewise exempt from liability, to the same extent as was the property thus wrongfully levied upon and sold, and can not be subjected to the debts of the person recovering the same, until such reasonable time thereafter as is necessary to enable him to re-invest the same in property exempt from execution.¹

§ 1420. And so in Iowa, a homestead may be changed and another acquired, exempt from liability for debts contracted after the acquisition of the first, although the purchase of the new one be in part with means not procured by sale of the old one, if the amount invested does not exceed in the aggregate the sum procured by sale of the old one. Where there is no unnecessary delay in re-investing in a new homestead, debts contracted before such re-investment is made, and after selling the old one, will not affect the new one.²

§ 1421. A mortgage foreclosure and judicial sale of the homestead, on a mortgage executed by the husband alone, during coverture, but not purporting to be on the homestead, is valid, and carries title to the purchaser under the decree and sale, if the wife be made a party to the foreclosure proceedings by personal service, and fails to appear and assert her homestead rights. Having had her day in court, she is estopped after sale to deny the validity thereof.³

Nor will it be cause for setting aside the sale, on application of defendant therein, that in addition to the land described in the decree other land is also sold, for though as to such other land the sale be void, and the purchaser takes nothing in that respect, yet he alone can complain, and not the debtor, who suffers no injury.⁴

§ 1422. The continued use of a room in the dwelling house, by storing or keeping the furniture therein, is a sufficient occu-

if procured by other means than those emanating from the former homestead, it is then liable for all debts of the owner of the date of recording the deed for the same. *Ibid.*

¹ *Tillotson v. Wolcott*, 48 N. Y. 188.

² *Benham v. Chamberlain*, 39 Iowa, 358; *Pearson v. Minturn*, 18 Iowa, 36; *Sargent v. Chubbuck*, 19 Iowa, 37; *Furman v. Dewell*, 35 Iowa, 170. Such is also the law in Illinois. Rev. Stat. of 1874, p. 498, Sec. 6; and the proceeds continue exempt for one year after the sale of the homestead. *Ibid.*

³ *Oleson v. Bullard*, 40 Iowa, 9.

⁴ *Ibid.*

pancy of the homestead in Massachusetts, within the meaning of the statute, to preserve the homestead right.

The exempting the homestead from execution sale by statute, and provision that no waiver thereof shall be valid except by deed, and no conveyance from the husband valid without the joinder therein of the wife, and declaring that such exemption is to continue after the husband's death for the benefit of the widow and children occupying the homestead, also places the homestead beyond the power of disposal of the same by will on the part of the husband.¹

§ 1423. But to take the benefit of the homestead exemption, it is not enough that the person claiming it be in possession of the premises, but he must be the owner thereof, (and though presumptions of ownership may arise from possession, especially if proceeded against as the property of the alleged occupant,) yet, where the facts make it apparent that the ownership or legal title is in another, and not in the tenant in possession, then such tenant can not claim exemption to the premises under the homestead law.² Thus, where land is purchased and paid for with the money of the debtor, and conveyance made to a third person in fraud of the creditors of such debtor, the creditors may subject the same to execution by proceedings in equity for payment of their debts, and the debtor can not interpose the claim of a homestead to prevent it.³ The conveyance is valid as against him, but void as against the creditors, and the property, having been paid for with the money that ought to have paid their debts, if the debtor is insolvent, is liable to be subjected to such payment.⁴

§ 1424. In Massachusetts, however, as in some others of the States, the owner of the homestead may let a portion of the exempted premises, and will not by reason thereof lose his homestead rights or privileges therein.⁵

¹ *Brettun v. Fox*, 100 Mass. 234; *Silloway v. Brown*, 12 Allen, 30; *Abbott v. Abbott*, 97 Mass. 136.

² *Sumner v. Sawtelle*, 8 Minn. 309; *Piper v. Johnston*, 12 Minn. 60; *Getzler v. Saroni*, 18 Ill. 511.

³ The same cases as above. This is upon the same principle as where lands fraudulently conveyed away by a debtor are uncovered in equity and sold on execution, that the surplus or excess of moneys arising from the sale belongs to the grantee in the fraudulent deed, and not to the debtor. *Norton v. Norton*, 5 *Cush.* 524; *Bowdoin v. Holland*, 10 *Cush.* 17.

⁴ *Ibid.*

⁵ *Mercier v. Chance*, 11 *Allen*, 194.

Nor will the assignment of dower to the widow in a part of the dwelling house bar her from her homestead, if previously entitled thereto in the other part.¹

And when a homestead is once acquired, it is not lost to the husband by the absence of the rest of the family, or even by the death or desertion or divorce of the husband or the wife.² If the homestead property be sold by the assignee of an insolvent debtor, without ever setting off to the insolvent debtor his homestead out of the land so sold, and the same is of greater value than that allowed for a homestead, the homestead debtor and purchaser hold in common, subject to be separated in their interests by partition.³

On an execution sale of the equitable right of redemption from a mortgage lien, on an execution against the mortgageor of real estate which is subject to a homestead, the legal result is that the purchaser takes subject to the homestead right, and therefore the fact that the sale was not expressed to be made subject to such right, does not in any manner militate against the validity of the sale. That which the law itself declares, and which all persons are therefore bound to know, need not be declared as part of the terms of bargain or sale.⁴

III. WAIVER THEREOF.

§ 1425. Whether a waiver of the benefit of the exemption law, embodied by a contracting party in the contract, will operate to render liable to execution sale, property exempt therefrom by law, is a point decided differently in different States.

§ 1426. In Iowa it is held that the waiver of exemption is nugatory, and does not render exempted property liable to sale on execution. That the enactment is a matter of State policy,

¹ *Mercier v. Chance*, 11 Allen, 194.

² *Sillaway v. Brown*, 12 Allen, 30, 34; *Doyle v. Coburn*, 6 Allen, 73; or by her divorce. *Ibid.* Nor by a temporary removal, if no other homestead or domicile is obtained during such removal. *Dulanty v. Pynchon*, 6 Allen, 510; *Helm v. Helm*, 11 Kansas, 21.

³ *Sillaway v. Brown*, 12 Allen, 30, 35, 36.

⁴ *Swan v. Stephens*, 99 Mass. 7. And in an action by the purchaser for the possession of the premises, the defendant in possession being entitled to such homestead, may set up and rely on the same as a defense to the action as to the right of the homestead, and recovery, if had, is subject thereto. *Ibid.* And *Stebbins v. Miller*, 12 Allen, 591; *Sillaway v. Brown*, 12 Allen, 30, 35; *Castle v. Palmer*, 6 Allen, 401.

and not that which the citizen may disregard. That although the same property might be sold by subjecting it to a mortgage foreclosure, yet the mere assent of the debtor expressed in the contract of indebtedness, will not render the statute inoperative, and make the property liable to seizure on execution, and to sale thereon. That the functions of the writ or powers of the officer can not thus be enlarged. And this would seem to me the better view of the case. It is the interest of the State to protect the welfare of its people against improvidence and against oppression. The operation of the exemption law, in its beneficence, extends to the family, if there be one, of the contracting debtor, as well as to the debtor himself. If by his bare consent, the law be defeated, and that without consideration or benefit, the exigencies of the result falls not on the debtor alone, but on those whom he is bound by law to provide for and protect; on those whose hands are tied by infancy or coverture, and who therefore are unable to help themselves. There would be fully as much plausibility in contracting for personal imprisonment, as of old, for debt, and which the State has abolished. No process at law could in either case execute the contract. The office of the writ could not thus be enlarged. It is in either case a contract, if not expressly prohibited, at least against the policy of the law, and for the enforcement of which no process of execution exists at law. If its enforcement were attainable at all, it could only be by specified performance, which would operate unequally, as it is never awarded in personal matters; and if it were, could not be thought of for a moment to enforce an arrangement made against the policy and moral interest of the law.¹

§ 1427. In Pennsylvania, and some others of the States, the ruling prevails to the contrary, and the waiver is allowed to render the property liable to execution sale, but to our mind the functions of the writ and powers of the officer can not be thus enlarged by agreement of parties. If the policy of the State was not in the way, the only force of such sale would be by estoppel; but this may not be invoked to sustain acts done

¹ *Curtis v. O'Brien*, 20 Iowa, 377; *Troutman v. Gowing*, 16 Iowa, 415; *War nibold v Schlichting*, 16 Iowa, 243; *Woodward v. Murray*, 18 Johns. 400; *Max well v. Reed*, 7 Wis. 582; *Kneetle v. Newcomb*, 22 N. Y. 249; *Crawford v. Lockwood*, 9 How. Pr. 547; *Gilman v. Williams*, 7 Wis. 329.

against the policy of the law, and therefore can not be resorted to in favor of such sales where the policy of the law regards them with disfavor. Why not, by like agreement, restore imprisonment for debt, although by law it is abolished? We find, however, as has been stated, that by the ruling in several of the States, the exemption is held to be removed when there is a waiver thereof in the original contract.¹

§ 1428. Notwithstanding, a judgment rendered on warrant of attorney executed by a lunatic, is valid in a collateral inquiry; and so in an execution sale thereon; and that the latter will be so held in an action of ejectment, yet such judgment is rendered by the clerk under the statute requiring him to do so, on presentation of a warrant of attorney to confess judgment, and on producing the evidences of the debt; still a waiver of inquisition and of the benefit of the exemption law, embodied in such judgment, although expressed to be authorized by the warrant of attorney, is not binding as part of the judgment, for that authorizes rendering the ordinary judgment only, by the clerk, and not the introduction therein of other matter.²

Therefore, the waiver being only matter of consent and not of judgment, is void for want of power to consent, if it be shown even in a collateral proceeding, that at the time of making the warrant of attorney, the defendant making it was a lunatic. The judgment itself is valid as matter, *res adjudicata*, on collateral inquiry, but not so the *waiver*, for it is no part of the judgment under the statute, and although embodied therein, does not partake of the character of a judgment; and thus a sale, in such case, on execution emanating from such judgment, made without any inquisition, when one is required by statute, is void, if the execution purchaser has knowledge of such incapacity at the time of buying; and proof of such incapacity and of the purchaser's knowledge thereof may be made in a collateral proceeding.³

§ 1429. But notwithstanding the ruling in Iowa, that by a

¹ Case *v.* Dunmore, 23 Penn. St. 93; Lauck's Appeal, 24 Penn. St. 426; Line's Appeal, 2 Grant's Cas. 196; Johnston's Appeal, 25 Penn. St. 116; Bowman *v.* Smiley, 31 Penn. St. 225; Smith's Appeal, 23 Penn. 310; State *v.* Melogue, 9 Ind. 196; Eltzroth *v.* Webster, 15 Ind. 21; Chamberlain *v.* Lyell, 3 Mich. 448.

² Hope *v.* Everhart, 70 Penn. St. 231.

³ Ibid.

cotemporaneous agreement, at the time of contracting the indebtedness, the debtor can not so waive the benefit of the exemption law, as to deprive him of the right to avail himself of it subsequently when there is a levy to satisfy the indebtedness, it is nevertheless held by the same court that by surrendering to the officer property to be levied on, upon a writ of execution by the debtor, he thereby estops himself from reclaiming the same from being sold, and loses in that respect the benefit of the statute. That having voluntarily rendered up property to be levied on and sold, as liable to such proceeding, he should not thereafter be allowed to say it is of a different character.¹

§ 1430. In Indiana, where the ruling is in favor of a waiver of exemption, there is a constitutional provision that "the privilege of the debtor to enjoy the necessary comforts of life should be recognized by wholesome laws, exempting a reasonable amount of property from seizure for the payment of any debt or liability hereafter contracted; and there should be no imprisonment for debt, except in cases of fraud."

In Indiana, then, we see that both the exemption from sale and from imprisonment for debt rest upon the same high ground of constitutional authority, subject simply to regulation by the legislature as to the amount of property to be exempted. The courts there hold that the debtor may waive the exemption.² Would not the same ruling apply with equal propriety to the imprisonment? And are the courts prepared to go thus far? We think the functions of the writ can not be extended to either, by mere private will of the parties, if the language in each case was of the same character. But as to imprisonment for debt, it is *prohibitory*, while, in reference to exemptions from sale, it seems to merely confer a *privilege* at the option of the debtor. Hence it is held, by the courts of that State, that, in the language of the constitutional provision above cited, the right of the debtor to avail himself of the exemption, is a personal *privilege*, which he may exercise or not, at his election.³

In accordance with this constitutional provision, the statute of Indiana exempts from execution sale, three hundred dollars

¹ Richards *v.* Haines, 30 Iowa, 574.

² Eltzroth *v.* Webster, 15 Ind. 21; State *v.* Melogue, 9 Ind. 196.

³ Sullivan *v.* Winslow, 22 Ind. 153; State *v.* Melogue, 9 Ind. 196; Eltzroth *v.* Webster, 15 Ind. 21.

in value, of the debtor's property to be selected by the debtor, either real or personal, at his option, for it declares, that "if any execution debtor shall claim property as exempt," "he shall elect whether he will claim personal or real property," and makes provision, in case a claim of exemption is made, for appraisement as a means of ascertaining the value. And by a subsequent statute it is provided that the officer need not set apart to the debtor, property as exempt, until after certain appraisement and inventory required by the statutes are made.¹ These provisions, taken as a whole, sufficiently show that the exemption in that State is not *absolute* as an inhibition to sell particular property, for none is particularized by the statute, and that therefore, as the selection thereof is left to the debtor, it remains but a mere personal privilege on his part, as there held, to enforce exemption or not, when a levy is made.² From all which it results, that when an execution is levied on the property of a debtor, in that State, the debtor may *waive* the privilege of exemption if he will, either by express waiver, or by omission to interpose the claim or *privilege* of exemption, which will amount to the same thing; and such is now the settled ruling of the courts in that State.³ Whether, under the constitution, the legislature might make the exemption absolute as to certain property by description, the Supreme Court of Indiana have deemed it unnecessary to decide as a question not directly involved in cases that have arisen.⁴ We have no doubt, however, as to the power of a State legislature, when not expressly inhibited from so doing by the constitution, to make laws declaring what shall and shall not be subject to forced sale, and that too, so far as regards exemption, either as a *mere privilege* of the debtor to be enforced at his election, or as an absolute inhibition to sell property designated by description as shall be the policy of the State in view of the welfare and general good of its people, and that in the latter case, no consent or waiver of the debtor can enlarge the force of the writ, to make a sale an official one, of property so inhibited from execution sale. Any sale by per-

¹ *Sullivan v. Winslow*, 22 Ind. 153.

² *Ibid.*; *State v. Melogue*, 9 Ind. 196; *Eltzroth v. Webster*, 15 Ind. 21.

³ *Sullivan v. Winslow*, 22 Ind. 153. But it does not follow from this, that such waiver may be contracted for, in the creation of a debt, and afterward be enforced against the debtor.

⁴ *Sullivan v. Winslow*, *supra*.

mission, express or implied, would amount to no more than a sale by the debtor himself.

§ 1431. We conceive the correct and better doctrine to be that which is held in the case of *Curtis v. O'Brien*, 20 Iowa, 377, and kindred cases. In this case the court say: "We are agreed in the conclusion that a person contracting a debt can not, by a cotemporaneous and simple waiver of the benefit of the exemption laws, entitle the creditor, in case of failure to pay, to levy his execution, against defendant's objection, upon exempt property."

§ 1432. As the same law also exempts from liability to debt, by garnishment, attachment, or execution, the money proceeds of daily labor, earned within a given time, in many of the States, it follows, by a parity of reasoning, that wherever the doctrine of the Iowa court, above referred to, prevails, such earnings or wages, whether payable in money or property, are in like manner incapable of being subjected to the debt of a debtor, by waiver of the exemption at the time of and in the contract creating the debt. The cases are parallel. And by a like reasoning it would likewise follow, that wherever the creditor may reach the one, he may also reach the other.

§ 1433. In *Kneetle v. Newcomb* and *Woodward v. Murray*,¹ it is held that the object of the law is "to promote the comfort of families and to protect them against the improvidence of their head." That "one object of municipal law is to promote the general welfare of society," and that "the exemption laws seek to accomplish this by taking from the head of the family the power to deprive it of certain property, by contracting debts which shall enable the creditors to take such property on execution." In the case of *Kneetle v. Newcomb* the whole subject is discussed with much ability. The court there say: "Could a person, when contracting a debt, agree, for instance, that the act abolishing imprisonment for debt should not apply to any judgment which should be recovered," on a certain contract, "or that on such judgment there should be no right in the debtor to redeem any land that might be sold under the execution, or that he should not be discharged under any insolvent act?" The court say: "Clearly this could not be done;" and that "upon the same principle," the debtor "could not, when contracting the

¹ *Woodward v. Murray*, 18 Johns. 400; *Kneetle v. Newcomb*, 22 N. Y. 249.

debt, agree that exempt property might be taken on execution." That "the law does not permit its process to be used to accomplish ends which its policy forbids," though such use be agreed to. And so in the case of *Maxwell v. Reed*,¹ the court say that "agreements to waive all right of exemption are null and void as against the policy of the law." The Constitution of Wisconsin contains a provision requiring the legislature to exempt a reasonable amount of property from sale on execution. This provision is substantially the same, if not in the identical words of the provision for the same subject contained in the Constitution of Indiana, which was recited above. In view of this, the Wisconsin Supreme Court aptly ask the question, by way of illustration, "Can the contracting parties not only repeal a statute, but upset the Constitution itself?" That court wisely assert that "the citizen is an essential elementary constituent of the State; that to preserve the State the citizen must be protected; and that to live, he must have the means of living; to act and to be a citizen, he must be free to act, and to have somewhat wherewith to act, and thus to be competent to the performance of his high functions." Hence the State policy, say the court, of exempting such interests from sale on execution as shall enable him to discharge such services and devotions as may be due from him to the commonwealth.

§ 1434. In Illinois a waiver of the homestead exemption is allowed by statute, "if the same shall be in writing, subscribed by the householder and his wife, if he have one, and acknowledged in the same manner as conveyances of real estate are by law required to be acknowledged." It is moreover declared to be the "object of the act to require in all cases the signature and acknowledgment of the wife as conditions to the alienation of the homestead." Now, under this state of the law in Illinois, where a homestead had been conveyed away by a fraudulent conveyance, and was uncovered in chancery on a creditor's bill, and without such waiver in writing, was sold by decree of the court, it was held that in an action of ejectment involving title under the decree and sale, the homestead could not be set up at law in such collateral proceeding; that the court having jurisdiction of the parties, the decree is final; that no claim of homestead having been interposed at the trial on the creditor's bill, it can not now for the first

¹ 7 Wis. 582, 594.

time be made.¹ The case of *Miller v. Sherry* referred to, does not involve the question of direct power to waive the exemption, but rests upon the unreversed decree of the court ordering the property to be sold in the ordinary course of judicial proceedings, made without any intervention at the time that the property was a homestead. Of course a regular and a fair sale to a *bona fide* purchaser, made under such a decree, would carry the title, and could not be questioned in a collateral proceeding upon the plea or showing that the property sold was the homestead. This being the only point relied on as against the validity of the sale, its validity was rightfully sustained in such collateral proceedings. Whether right or wrong, the decree was binding until set aside or reversed, and so likewise the sale made in pursuance thereof; but where the power to waive the exemption, as in Illinois, is given by statute, by the same authority that confers the exemption, there could, of course, no question arise as to the ability of the debtor to contract for a waiver of the privilege. In this case of *Miller v. Sherry*,² the homestead seems to have been of greatly larger value than that allowed in exemption by the statute of Illinois. Hence the inducement, perhaps, to the fraudulent conveyance. The debtor still continued in possession, notwithstanding the conveyance, and occupied it as a homestead; but no such claim was interposed in defense of the chancery proceeding to subject it to sale for debt. On error in the United States Supreme Court, in the ejectment suit in which the claim of homestead exemption was interposed, the said Supreme Court lay no stress upon the excess of value, but say: "In regard to the homestead right claimed by the plaintiff in error, there is no difficulty. The decree under which the sale was made to Bushnell expressly divested the defendant of all right and interest in the premises. It can not be collaterally questioned." Thus the United States Supreme Court hold that, having jurisdiction, the decree of sale is final, as well of the homestead as of other property, if the objection be not interposed before decree, or the decree be not, before sale, reversed.

§ 1435. A similar ruling is had in Iowa, in the case of *Haynes v. Meek*,³ where a mortgage debtor attempted to set up the home-

¹ *Miller v. Sherry*, 2 Wall. 237. And so in Iowa, on mortgage foreclosure. *Haynes v. Meek*, 14 Iowa, 320.

² 2 Wall. 251.

³ 14 Iowa, 320 321.

stead right as a defense against the title of a purchaser at the mortgage sale, made judicially on decree of foreclosure. The court hold that the mortgageors, having had their day in court as parties to the foreclosure proceeding, and having there omitted to make the alleged defense of fraud in obtaining the wife's signature to the mortgage deed, they could not set the defense up, collaterally, and thus go behind the mortgage decree. In this case the court say, that if the defense be true, "the plea is bad, for the reason that this homestead right, if it ever existed, was lost to him (defendant) by failing to set it up in the foreclosure proceeding; in other words, he has had his day in court upon this alleged homestead right." But in Ohio it is held that a decree uncovering property from a fraudulent conveyance, made in behalf of an execution creditor, and subjecting such property to sale, is of no higher character than an execution would be when issued on the same judgment, as against the operation of the homestead law, and that it is sufficient, in point of time, if the objection that the property is exempt from sale as a homestead is made at the time the decree is about to be executed.¹ In the case cited the court hold that, "thoug the final process on decrees in chancery for the sale of property was called 'an order of sale,' it was nevertheless a 'writ of execution on a decree,' within the meaning of the statute." That as the plaintiffs therein were only asserting the rights of judgment creditors, the "order of sale merely took the place of an ordinary execution upon their judgment;" and that the attempt to sell on such order is clearly within the statute by which the homestead is exempt. In the case cited,² the court go further, and hold that the execution of a conveyance of the homestead by a judgment debtor, which is fraudulent as against the judgment creditor, will not subject the property so fraudulently conveyed away to sale upon execution. Nor will the uncovering of it by a decree at the suit of the judgment creditor setting such conveyance aside; that such creditor's claim is not "under or through the fraudulent conveyance, but adverse to it;" and that when at their suit the deed is set aside, they, as creditors, "can not set up such void conveyance to enlarge their rights or remedies against the debtor;" that "as between creditor and debtor the deed is simply void, and can not, there-

¹ Sears v. Hanks, 14 Ohio St. 298, 302.

² Ibid. 300, 301.

fore, affect the rights of either;" that "if the debtor have no title or interest in the property levied on, there is nothing for the creditor to sell;" and that it is not competent for the creditor to deny the right of the debtor and at the same time to sell the property as his; that "if he has an interest in the homestead property which the creditor can sell, he has interest enough to secure his homestead from sale;" that the homestead act is to be liberally construed as wise and humane, and as "intended to protect the family from the inhumanity which would deprive its dependent members of a home."

§ 1436. In Massachusetts, it is held that where property, which is exempt from attachment and execution, is seized and levied on by process of attachment or execution, and the law is not in terms prohibitory of such seizure and levy, but merely confers on the debtor the right of holding the property as exempt from levy and sale, then the benefit of such exemption may be waived.¹ Such waiver, when the levy and seizure are actually made, may be expressed or implied, and if either, it will be obligatory upon the debtor.² But it does not follow from this that a waiver may be agreed on and become obligatory prospectively, at the time of contracting or creating the liability on which the proceeding is predicated.³ A waiver of exemption arises by implication when property is seized and levied on and defendant, knowing thereof, omits to claim the benefit of the exemption, for such omission leaves the officer to carry out the mandate of the writ by actual sale. In so doing he does not violate his duty or render himself liable, unless the law is *prohibitory* and describes the property which is prohibited from being sold. And if by mere acquiescence the debtor can waive his rights, it would seem to follow, as a sequence thereto, that he may do the same in express terms. A statute may, from public policy as well as from motives of benevolence and mercy, *absolutely prohibit* the levy and sale of certain property by description; and when such is the case, it is not in the power of the debtor to render legal, by consent express or implied, an act which the law has prohibited. But where the law is merely directory, or merely confers

¹ Dow *v.* Cheney, 103 Mass. 181.

² Ibid.; Nash *v.* Farrington, 4 Allen, 157; Clapp *v.* Thomas, 5 Allen, 158; Woods *v.* Keyes, 14 Allen, 236.

³ Crawford *v.* Lockwood, 9 How. Pr. 547; Curtis *v.* O'Brien, 20 Iowa, 376; Kneetle *v.* Newcomb, 31 Barb. 169.

the privilege of exemption upon the debtor, then he may waive the privilege, after actual seizure, and that waiver may be express or by implication. It does not follow from this, however, that a stipulation for such waiver, in contracting the liability, is binding.¹

§ 1437. A waiver of exemption from execution sale in favor of one judgment creditor, (where that is admissible,) does not operate as such in favor of another, nor does it prevent the debtor claiming exemption against other judgment creditors. Nor is it in itself a *fraud* upon such other creditors, especially where the waiver is in the instrument creating the debt in favor of which the waiver is made. Such waiver may have been given for considerations of the gravest importance to the interest of the debtor.² If the debtor be absent his wife may claim the benefit of the exemption law in his stead.³ Goods exempt from execution belong to the debtor absolutely, to sell or dispose of as he pleases, and will not be liable, even though converted into new stock; they are still protected by the exemption.⁴

§ 1438. Where the law expressly exempts from execution certain property, by actual description, then it is the duty of the officer holding the writ to forbear to levy on or meddle with the same, and this, too, whether the defendant in the writ asserts the right of exemption or not, and if in such case the officer seize upon or interfere with property thus described in the statute as exempted, he is guilty of a trespass, and an action lies against him therefor.⁵ In such action it is the province of the court to decide what articles are exempt by law; but any question of fact involved is for the decision of the jury.⁶

§ 1439. In Indiana, the exemption is in favor of *householders*, which means *householders* in that State, for laws are made by a State for the government of those within and not those without its jurisdiction. Therefore, on the owner of exempted property, in Indiana, ceasing to be a householder within the State, the

¹ Same cases as cited in previous note.

² Thomas' Appeal, 69 Penn. St. 120.

³ McCarthy's Appeal, 68 Penn. St. 217.

⁴ Ehrisman v. Roberts, 68 Penn. St. 308.

⁵ Woods v. Keyes, 14 Allen, 236, 238; Bean v. Hubbard, 4 Cush. 85; Davlin v. Stone, Id. 359.

⁶ Woods v. Keyes, *supra*.

exemption also ceases, and the property may be levied on and sold.¹

* But a debtor holding property in said State thus exempt from execution, may sell the same before it becomes liable to levy, and the buyer will take it free from such liability.² And by a parity of reasoning the owner may exchange or barter it with like effect.³

§ 1440. When the husband and wife dwell together, and the property of the husband does not amount in value to the limit by law prescribed as exempt from execution, levy and sale, and the wife, who is the real debtor, owns property which is levied on, upon execution against her, she is entitled, under the Indiana exemption laws, to have exempt from liability on the writ property to an extent which, together with her husband's property, will equal the amount protected by the statute.⁴

The intent of the law is to preserve a home or means of support for the family, and not alone for its head as distinguished from the members.⁵

§ 1441. In Nebraska, the homestead exemption is held to be a mere personal privilege, of which advantage may be claimed and the extent thereof pointed out, or it may be waived, or may be lost by omission to claim and point out the same.⁶

One member of a co-partnership firm, though he be the head of a family, can not enforce exemption of any part of the firm's property which is levied on to pay firm debts.⁷ Nor is the exemption applicable to sales of mortgaged property under mortgage foreclosure against the homestead. Giving the mortgage is a waiver of the exemption.

¹ *Finley v. Sly*, 44 Ind. 266.

² *Vandibur v. Love*, 10 Ind. 54.

³ *Ibid.*

⁴ *Crane v. Waggoner*, 83 Ind. 83.

⁵ *Ibid.*

⁶ *Rector v. Rotton*, 3 Neb. 171.

⁷ *Ibid.*

⁸ *Ibid.*

PART III.

CHAPTER XXII.

APPLICATION OF THE PROCEEDS OF SALES, WHETHER JUDICIAL OR EXECUTION.

§ 1442. Whether the sale be a judicial one, or ministerial, as on ordinary execution, the officer should return the proceeds into court for application or distribution. In executions, the command of the writ is to have the money in court. The court has power to control, by order, the application or distribution of the funds in cases of dispute.¹

§ 1443. A motion at law is the remedy by which to obtain distribution or correct a distribution, and is to be made in the same court whence proceeded the authority to sell.²

§ 1444. The order, when made, is a protection to the officer, and if not appealed from, is final.³ But not against outsiders not parties to the proceedings.⁴

1445. In *Howard's Case*,⁵ it was held, in Alabama, and again by the Supreme Court of the United States, that such adjudication, or order of distribution, will not affect the rights of outsiders not in some manner parties to the proceedings before the court. On the contrary, while the order of distribution, when made, is final, in like manner as other judgments or final findings, until set aside or reversed, as between the parties before the court, other parties in interest, if any, may assert

¹ Robinson's Appeal, 62 Penn. St. 217; *Turner v. Fendall*, 1 Cranch, 117; *Wiley v. Bridgman*, 1 Head, 68.

² *Chittenden v. Rogers*, 42 Ill. 95.

³ *Noble v. Cope's Admrs.*, 50 Penn. St. 17, 20.

⁴ *Howard's Case*, 9 Wall. 175.

⁵ 9 Wall. 175. And see, as bearing on this, *Buchter v. Dew*, 39 Ill. 40, and *Warren v. The Iscarian Community*, 16 Ill. 114, involving wrongful distribution by the sheriff without intervention of the court. The injured party may sue those obtaining the advantage, but the sheriff can not.

their rights by proper application to the courts, irrespective of such order, and may enforce the same against any or all of them who may wrongfully obtain such part of the proceeds as would have inured to such outside party, if in court at the making of the order of distribution.

§ 1446. The first levy, if there be no priority of either writ, withdraws the property from liability to be again levied while thus in the hands of the law, whether such first levy be on process from the State or from the United States courts, and gives such first levy priority of satisfaction. But if there are two or more writs, from the same jurisdiction, in the hands of the same officer at one and the same time, and neither emanate from judgments that are liens, then, as before stated, they are to be paid ratably out of the proceeds. This can not be done, however, as between a United States marshal and a sheriff. In the absence of liens, the first levy has precedence in distribution of the funds. A levy vests a special property in the officer. Such property can not be thus vested at the same time in both.¹ If there is a lien contravened by the first levy, the party injured should apply to the court issuing the writ on which such levy is made for relief.

In *Noble v. Cope's Admrs.*,² the court say, in reference to the order of distribution, that "it was neither excepted to nor appealed from, but was acquiesced in by Noble and all other creditors of Klusmeyer. It concluded, of course, every issue that could have been properly litigated therein."

§ 1447. If there be several executions, and one or more of them emanated from judgments that are liens, then these are first to be satisfied. Their satisfaction is each in its order according to seniority.³

But the costs of the officer are not to be postponed to such seniority. He is entitled to his costs, and so, also, as to the costs generally of the writ on which the sale is made; whether it be senior or junior, the costs should be paid out of the proceeds.⁴

§ 1448. The actual costs of sale are first to be paid; the

¹ *Hagan v. Lucas*, 10 Pet. 400; *Schaller v. Wickersham*, 7 Cold. 376.

² 50 Penn. St. 30.

³ *Steele v. Hannah*, 8 Blackf. 326; *State v. Salyers*, 19 Ind. 432; *Bagby v. Reeves*, 20 Ala. 427; *Lawson v. Jordan*, 19 Ark. 297; *Thomson v. McCordel*, 27 Geo. 273; *Newton v. Nunnally*, 4 Geo. 356.

⁴ *Shelly's Appeal*, 38 Penn. St. 210; *McNeil v. Bean*, 32 Vt. 429.

residue is to be applied on the liens divested by the sale, in their relative priority.¹ By the terms *costs of sale*, are meant those which commence with the issuing of execution necessary to effect the sale. If the amount raised be less than will pay off the liens which are prior to that of the judgment on which the sale is made, then of course no part of the costs made prior to issuing the writ on which the sale is made, can be applied to the judgment in that case; for such costs are *incident* to the judgment, and must be postponed with the judgment.²

§ 1449. The equity of a co-partnership creditor to have satisfaction out of the partnership property of the debtors, is superior to, and will take priority over, a mortgage made to secure a subsisting debt of one of the partners, where the mortgagee parts with no new consideration, or in any manner changes his condition, and the property mortgaged, be in equity that of the co-partnership, though the title thereof be held in the name of the member of the firm who makes the mortgage; and the rule is the same although the mortgagee has no notice of the equitable interest of the firm in the mortgaged property, at the time of taking the mortgage. He is a mere *volunteer*, and is not to be regarded as a *bona fide purchaser*. He has parted with nothing.³

§ 1450. If the senior judgment be against the defendant by a wrong name, or in a foreign language of his right name, then the writ emanating thereon loses its preference in the distribution; for the law requires proceedings in the English language.⁴

§ 1451. So, if the senior judgment be dormant, the writ issued thereon loses its priority.⁵ And so between two writs where both have issued on separate judgments after the year and a day, the first levy gains priority.⁶

§ 1452. In case of several writs emanating alike from judgments that are not liens, neither will have preference, but they are to be satisfied ratably.⁷ Though the leading case to the last

¹ Fry's Appeal, 76 Penn. St. 82.

² Ibid.

³ Lewis *v.* Anderson, 20 Ohio St. 281; Dickerson *v.* Tillinghast, 4 Paige, 215; Coddington *v.* Bay, 20 Johns. 637; Padgett *v.* Lawrence, 10 Paige, 180; Roxborough *v.* Messick, 6 Ohio St. 448; Jewett *v.* Palmer, 7 Johns. Ch. 67.

⁴ Heil & Lauer's Appeal, 40 Penn. St. 453.

⁵ Lytle *v.* Cincinnati Man. Co., 4 Ohio, 459.

⁶ Sellers *v.* Corwin, 5 Ohio, 398.

⁷ Bridenbecker *v.* Lowell, 32 Barb. 9; Wilcox *v.* May, 19 Ohio, 408; Hagan *v.* Lucas, 10 Pet. 400.

point cited was a case of mortgages, yet the same rule applies to writs of execution generally, where there is no seniority of lien.¹

§ 1453. In a question of priority of payment between executions issued from different courts, the court from which emanated the writ on which sale is made is the one to settle the priority.²

§ 1454. Though a plaintiff have the senior lien he can not apply the proceeds of sale, if the debtor be insolvent, to the prejudice of a younger writ, for a debt for which he himself is security. The court will apply the funds to satisfy the junior writ.³

§ 1455. By omission to follow up an execution from term to term with an *alias*, *pluries*, etc., execution issued on a judgment rendered in the interim will gain precedence if the prior judgment be not a lien.⁴

But if the succession be kept up in a timely manner, the subsequent writs will relate back to the teste of their original and carry its lien, as to the personality, to that date.⁵

The safer course is a *venditioni exponas*, with a clause of reference to the original writ and levy.⁶

§ 1456. If there are several writs, the one earliest in teste takes preference for satisfaction out of the personality.⁷

§ 1457. In proceedings against the heir of a deceased debtor the oldest judgment and execution take priority.⁸

§ 1458. Indulgence granted on the original writ does not destroy its lien as to the debtor and those claiming under him⁹ by purchase from him.

§ 1459. In a conflict for satisfaction between a mechanic's

¹ Wilcox *v.* May, 19 Ohio, 408; *Ex parte* Stagg, 1 Nott & McC. 405; Hagan *v.* Lucas, 10 Pet. 400; Lawson *v.* Jordan, 19 Ark. 297; Matthews *v.* Warne, 6 Halst. 297.

² Woodruff *v.* Chapin, 3 Zabr. 566. The court issuing the senior execution, (if from different courts,) has the sole jurisdiction.

³ Rowland *v.* Goldsmith, 2 Grant's Cas. 378; and as bearing upon the same subject, see, also, Collins' Appeal, 35 Penn. St. 83; Moss' Appeal, 35 Penn. St. 162; *In re Connor*, 12 Rich. L. 349.

⁴ McBroom *v.* Rives, 1 Stew. (Ala.) 72; Cary *v.* Gregg, 3 Stew. (Ala.) 433; Dawson *v.* Shepherd, 4 Dev. L. 497; Palmer *v.* Clarke, 2 Dev. L. 354.

⁵ Stamps *v.* Irvine, 2 Hawks, 232; Gilky *v.* Dickerson, Id. 341.

⁶ Yarborough *v.* The State Bank, 2 Dev. L. 23.

⁷ Green *v.* Johnson, 2 Hawks, 309.

⁸ Irwin *v.* Sloan, 2 Dev. L. 349; Ricks *v.* Blount, 4 Dev. L. 128.

⁹ Arrington *v.* Sledge, 2 Dev. L. 359.

lien and a prior mortgage, the rule in Illinois is to apportion the proceeds, when insufficient for both, in such manner between them as to give the mechanic's lien the relative portion of increased value caused by the improvements. That is, such sum as bears its just proportion to the proceeds of sale in reference to the mortgage debt.¹

§ 1460. In Kansas an unrecorded mortgage of land is entitled to prior satisfaction over an execution and judgment junior in date to the mortgage. Though judgments are liens, they are not recognized as such as against lands to which others have an equitable priority for satisfaction of a debt.²

§ 1461. The rule in Louisiana is, that a mortgage creditor may follow the proceeds of an administrator's sale of the mortgaged lands, and have them applied on satisfaction of the mortgage debt. He is subrogated to the fund arising from the sale.³

§ 1462. In Alabama, as between writs of equal priority, the fund is equally divided between them, and if an excess over either one, the excess is equally distributed between the others.⁴

§ 1463. An execution for the purchase money of property sold on it, takes precedence over a mechanic's lien of subsequent origin to the original purchase of the property by the mechanic's lien debtor.⁵

§ 1464. In Illinois, in case of several mechanic's liens of equal priority, as to date of judgment, the proceeds of sale are equally distributed between them.⁶ And so, in that State, in reference to satisfaction of several writs of attachment against the same defendant, the proceeds are to be applied *pro rata* on the judgments.⁷ In distributing the proceeds of sales in admi-

¹ *Croskey v. N. W. Man. Co.*, 48 Ill. 481; *Howett v. Selby*, 54 Ill. 151; *Dingledine v. Hershman*, 53 Ill. 280.

² *Swarts v. Stees*, 2 Kansas, 236.

³ *Tureaud v. Gex*, 21 La. Ann. 253.

⁴ *Bizzell v. Hardaway*, 42 Ala. 471.

⁵ *O'Conner v. Warner*, 4 W. & S. 223. The ruling to the contrary in *Lyon v. McGuffey*, 4 Penn. St. 126, was in a case where the vendor, by his own laches, in not recording his judgment in time, lost his preference. See, also, *Stoner v. Neff*, 50 Penn. St. 258, 261, where the court, referring to the case of *Lyon v. McGuffey*, say the vendor's lien was lost in that case, "because the vendor let go his grasp upon the purchase money by omitting to file his judgment for ten days after parting with his title."

⁶ *Buchter v. Dew*, 39 Ill. 40.

⁷ *Warren v. The Iscarian Community*, 16 Ill. 114.

ralty cases brought to enforce claims for supplies, or material furnished the ships in foreign ports, the party commencing proceedings is entitled to priority of payment.¹

§ 1465. An *alias fieri facias*, although issued subsequently to an original junior one, bears relation back to the date of the original writ, of which it is the *alias*, and will take precedence, in the same manner as would the original one which it follows; it will therefore overreach original executions of junior date to the original of the *alias* in the hands of the officer in the application of the proceeds of sale.²

§ 1466. In admiralty sales, next after the satisfaction of privileged lien debts, for that which enters into the life or safety of the vessel, if there be of the proceeds of sale remnants remaining in court, mortgage debts will be entitled to satisfaction out of the same, as against the owner or owners of the vessel. In the language of BETTS, Justice: "As the mortgage debts will absorb the remnants in court, it is unnecessary to consider the point discussed at the hearing, whether an unprivileged debt, owing by the owner of a ship, in the American courts, can be satisfied by order of the court, out of remnants in court, from the sale belonging to the owner; that is, whether the court has an equitable authority to apply such moneys to a general creditor of the general owner, contrary to his desire and direction."³

§ 1467. A sale of lands in Delaware, under and by virtue of a writ of *venditioni exponas*, divests the lands in the hands of the purchaser of all liens *due* or *not due*; the proceeds are to be distributed in order of priority among such, including the claim of the execution creditor. It is the policy of the law, as a means of conducing to the property bringing a fair price, to disincumber it of every other claim and impediment of sale.⁴

§ 1468. The rule in Delaware as to excess of funds raised upon execution sale, where the writ is against the executor or administrator as such, is that such surplus is to be paid to such executor or administrator; and this, too, whether the sale is of personal or of real property.⁵

§ 1469. Though conveyances made to defraud creditors are

¹ The Globe, 2 Blatch. C. C. 427.

² Allen v. Plummer, 63 N. C. 307.

³ Remnants in Court, Olcott's Admir. Rep. 382, 387.

⁴ Farmers' Bank v. Wallace, 3 Harr. (Del.) 370.

⁵ Vincent v. Platt, 5 Harr. (Del.) 164.

inoperative as against the creditors whom they were designed to defraud, yet they are, by a principle equally general, valid as against the grantors and their heirs. Therefore, where such conveyances are set aside in proceedings by an executor or administrator, and the land is uncovered, so that it is sold to pay the debts of the deceased, then, if there be a surplus of the sum arising from the sale over and above the amount of the debts, such surplus sum is not assets, in the hands of the administrator or executor, subject to general distribution, but belongs to the grantee in the fraudulent conveyance, and is held in trust for him.¹ This is upon the principle that the conveyance, being good as against the maker and his heirs, it results that they, the heirs, are not entitled to have any portion of the proceeds of the sale. The sale is for the benefit of the creditors only, and they only have a right to participate in the distribution arising therefrom. When they are satisfied, the residue of the fund, if any, belongs to the grantee in the fraudulent deed; for, as between the heirs and himself, his claim was paramount as to title to the land, and as a sequence resulting therefrom, is paramount in regard to any surplus remaining from the proceeds of the sale.²

§ 1470. It is a well settled principle, that one who claims adversely to the proceedings on which a fund in court is raised by sale, can not come in for a share in the distribution thereof. Thus if the goods of A. be sold on an execution against B., A. can not, in this proceeding, be heard to urge his right against the proceeds; neither can A.'s assignee. If the proceeding on sale by which the money is made was conducted in violation of the adverse possession of either, the remedy is by an action of trespass.³

§ 1471. The excess of purchase money of lands sold in probate for payment of a decedent's debts over and above the amount required for that purpose is to be treated as real estate, and distributed accordingly.⁴

§ 1472. In the distribution of proceeds of sale on a *fl. fa.*,

¹ *Allen v. Trustees of Ashley School Fund*, 102 Mass. 262; *Norton v. Norton*, 5 *Cush.* 524; *Bowdoin v. Holland*, 10 *Cush.* 17

² *Holland v. Cruft*, 3 *Gray*, 177, 181; *Allen v. Trustees of Ashley School Fund*, 102 Mass. 262, 266, 267; *Norton v. Norton*, 5 *Cush.* 524; *Bowdoin v. Holland*, 10 *Cush.* 17.

³ *Bush, Bunn & Co.'s Appeal*, 65 *Penn. St.* 363; *Helfrich's Appeal*, 15 *Penn. St.* 382; *Brant's Appeal*, 20 *Penn. St.* 141.

⁴ *Griswold v. Frink*, 22 *Ohio St.* 79; *Quinby v. Walker*, 14 *Ohio St.* 193.

confederate courts' judgments, if valid at all, are yet postponed until the judgments of the lawful government courts are all satisfied. They will not be entitled to rank as liens, and if recognized at all, it is merely as evidence *prima facie* of a debt.¹

§ 1473. But however erroneously or illegally the proceeds of sale may be applied by the court, or by the officer, if the latter have authority to receive the same from the purchaser, or whether the sale be a judicial or an execution sale, or be of realty, or of personality, there is one general principle underlying all such cases, and that is, the purchaser, *merely as such*, is not liable for the misapplication of the purchase money after he has paid the same. This principle was recently reiterated by the Supreme Court of the United States;² and though in a case of *judicial* sale of real estate, yet the principle, as we conceive, is a broad one, and covers all the cases above mentioned.

¹ Noble *v.* Cullom, 44 Ala. 554.

² Knotts *v.* Stearns, 1 Otto, 638.

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